110-219

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1124.

THE UNITED STATES, APPELLANT,

vs.

JAMES D. GRAHAM.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 12, 1883.

SUPREME COURT OF THE UNITED STATES.

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THE UNITED STATES, APPELLANT,

vs.

JAMES D. GRAHAM.

APPEAL FROM THE COURT OF CLAIMS.

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1 I. *Petition.*

In the Court of Claims.

JAMES D. GRAHAM
vs.
UNITED STATES.

Claimant's petition, No. 11957. Filed Sept. 16, 1878.—J. R.

To the honorable the Court of Claims of the United States:

The petition of James D. Graham respectfully shows to your honors:

That he is now, and was at the time his claim accrued, to wit, September seventeenth, A. D. 1872, a citizen of the United States and an officer of the Navy thereof.

That by an order of the Secretary of the Navy, dated August 10th, 1872, he was directed to proceed from New York, via the Isthmus of Panama, to the navy-yard at Mare Island, California, and to report for duty on board the United States steamer Benicia.

That your petitioner did so proceed by the steamer of the Pacific Mail Line, leaving New York on the twentieth day of August of said year, and arrived and reported for duty at said navy-yard on the seventeenth day of September as aforesaid.

That in so doing your petitioner travelled a distance of not less than five thousand three hundred miles.

Your petitioner further shows—

2 That by the second section of the act of Congress, approved March third, 1835 (Stats. at Large, vol. 4, p. 757), he was entitled, and still is entitled, to be paid mileage for said travel at the rate of ten cents per mile, in all five hundred and thirty dollars, but that the payment of said mileage, or any part thereof, has been refused him by the Fourth Auditor and Second Comptroller of the Treasury, and that he has never received the same, notwithstanding he has made frequent application therefor.

Your petitioner therefor' prays judgment against the United States in the sum of four hundred and five dollars, the said sum being the amount of the mileage above specified, less the sum of one hundred and twenty-five dollars, which, as your petitioner believes, was paid for a passage ticket furnished him by the pay director of the United States Navy stationed at New York.

JAMES D. GRAHAM,
Com'd', U. S. Navy.

ROB'T B. LINES, *Attorney.*

DISTRICT OF COLUMBIA,
County of Washington, ss:

James D. Graham, being duly sworn, deposes and says:

That he is the sole owner of this claim, and has never assigned or disposed of it, or any part of it, to any person; that he is justly entitled to the amount herein claimed from the United States after allowing all just credits.

and offsets; that he has at all times borne true allegiance to the Government of the United States, and has never in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States; and that he believes the facts set forth in the foregoing petition to be true.

JAMES D. GRAHAM.

Sworn to and subscribed before me this 10th day of September, 1878.

[L. S.] JAMES A. TAIT,
Notary Public.

3 II. *Traverse.—Filed Oct.* 3, 1878.

And now comes the Attorney-General on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegation and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

4 III. *Plea of limitations.—Filed Oct.* 3, 1878.

Now come the defendants, by their Attorney-General, and say that the claimant should not further have or maintain his suit against the defendants, for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

THOMAS SIMONS,
Assistant Attorney-General.

5 IV. *Motion for leave to amend petition.—Filed and allowed March* 15, 1882.

And now comes the claimant in the above-entitled cause, by his attorney, and moves the court for leave to amend his petition as follows:

1st. As to the distance travelled by petitioner, which should be 6,134 miles, as shown by the return of the Secretary of the Navy, instead of 5,300 miles, as stated in the petition.

2d. As to the amount of mileage for said travel, which should be $613.40 instead of $530, as stated in said petition; and

3d. As to the prayer for judgment, which should be for $488.40 instead of $405, as set forth in said petition.

And the claimant moves the court for leave to dispense with the printing of said amended petition.

ROB'T B. LINES,
Att'y for Claimant.

6 V. *Amended petition.—Filed March 22, 1882.*

To the honorable the Court of Claims of the United States:

The petition of James D. Graham respectfully shows to your honors:

That he is now, and was at the time his claim accrued, to wit, September seventeenth, A. D. 1872, a citizen of the United States and an officer of the Navy thereof.

That by an order of the Secretary of the Navy, dated August 10th, 1872, he was directed to proceed from New York via the Isthmus of Panama, to the navy-yard at Mare Island, California, and to report for duty on board the United States steamer Benicia.

That your petitioner did so proceed by the steamer of the Pacific Mail Line, leaving New York on the twentieth day of August of said year, and arrived and reported for duty at said navy-yard on the seventeenth day of September as aforesaid.

That in so doing your petitioner traveled a distance of not less
7 than six thousand one hundred and thirty-four miles.

Your petitioner further shows that by the second section of the act of Congress approved March third, 1835 (Stats. at Large, vol. 4, p. 757), he was entitled, and still is entitled, to be paid mileage for said travel at the rate of ten cents per mile, in all $613.40, but that the payment of said mileage, or any part thereof, has been refused him by the Fourth Auditor and Second Comptroller of the Treasury, and that he has never received the same, notwithstanding he has made frequent application therefor.

Your petitioner therefore prays judgment against the United States in the sum of $488.40, the said sum being the amount of the mileage above specified, less the sum of one hundred and twenty-five dollars, which, as your petitioner believes, was paid for a passage ticket furnished him by the pay director of the United States Navy stationed at New York.

8 JAMES D. GRAHAM,
Com'd', U. S. Navy,
By ROB'T B. LINES,
His Attorney.

DISTRICT OF COLUMBIA, *ss:*

Robert B. Lines, being first duly sworn according to law, on oath says:

That he is the attorney of the petitioner named in the foregoing amended petition, and that the matters and things therein stated are true to the best of his knowledge and belief.

ROBERT B. LINES.

Sworn to and subscribed before me this 22nd day of March, A. D. 1882.
[SEAL.] E. D. F. BRADY,
United States Commissioner.

9 VI. *Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Claimant was an officer in the Navy from August 10 to September 16, 1872.

II.

August 10, 1872, claimant was ordered by his superior officer to proceed from Washington via New York, the Pacific mail steamer, Aspinwall, and the Isthmus of Panama, to the navy-yard at Mare Island, California, and report for duty on the United States steamer Benicia.

III.

Claimant proceeded in accordance with said order, completing his journey September 16, 1872.

IV.

In obeying said order, claimant traveled 6,363 miles, viz: From Washington to New York, 229 miles, and from New York to Mare Island, 6,134 miles.

V.

For his traveling expenses from Washington to New York, claimant was paid $22.90, being at the rate of ten cents per mile.

VI.

For his traveling expenses from New York to Mare Island, claimant received only transportation on the Pacific mail steamers, for which the defendants paid $150.

VII.

In 1870, Lieut. R. M. Berry, U. S. N., was paid at the rate of ten cents per mile, less tax, for travel from San Francisco, Cal., to Sitka, Alaska, via Victoria, British Columbia, which was less than the actual expenses of such travel.

VIII.

Since the passage of the act of March 3, 1835 (4 Stat., 757), and until the late decision in the Temple case in the Supreme Court, October term, 1881, the Navy and Treasury Departments have, with the exception set forth in Finding VII, construed that act and subsequent acts on that subject, and decided that the ten cents per mile did not apply to travel to, from, or in foreign countries, but only to travel within the United States.

IX.

The custom, ruling, and practice of the Navy Department and the accounting officers, up to and at the time of the passage of the act of July 15, 1870, was not to pay naval officers, traveling abroad under orders, expenses of transporting their baggage.

X.

The Regulations of the Navy Department, adopted and issued in 1832, provide as follows:

[Extract.]

Rules of the Navy Department, regulating the civil administration of the Navy of the United States.

* * * CITY OF WASHINGTON. * * *

1832.

* * * * * * *

ALLOWANCE FOR TRAVEL AND TRANSPORTATION OF BAGGAGE.

* * * * * * *

CHAPTER X.—ALLOWANCES.

§ 2. When the travel is performed in a conveyance by land these allowances are fifteen cents per mile to captains and masters commandant and to judge-advocates not belonging to the Navy, and twelve cents per mile to all others.

When the travel is performed in a conveyance by water the allowances are ten cents per mile to those in the first class and eight cents per mile to those in the second.

* * * * * * *

ALLOWANCE FOR TRAVELING EXPENSES FROM ABROAD.

§ 1. Officers returning to the United States when ordered home, or coming home sick, when no conveyance in a public ship is to be had, will have their accounts for passage money paid by the Navy agent.

Soon after the passage of the act of March 3, 1835, and on the 6th day of April, 1835, the Treasury Department issued the following circular, to wit:

[Extract.]

CIRCULAR.

TREASURY DEPARTMENT, FOURTH AUDITOR'S OFFICE,
April 6, 1835.

Traveling expenses within the United States are fixed by law at ten cents per mile, and will be paid as heretofore by Navy agents. The nearest mail route will be the guide, to be ascertained, when practicable, from the Post-Office book of distances, &c.

The usual and necessary passage money actually paid by officers returning from foreign service, under orders or upon sick ticket, when they cannot return in a public vessel, will be paid as heretofore, as well as the like expenses of officers going out.

* * * * * * *

Very respectfully, your obedient servant,

AMOS KENDALL,
Fourth Auditor.

* * * * * * *

11 SECOND COMPTROLLER'S OFFICE,
April 6, 1835.

SIR: The circular instructions of April 6, 1835, made in conformity with the act of March 4, 1835, "to regulate the pay of the Navy," submitted by you for my consideration, are approved.

* * * * * * *

I am, sir, very respectfully, yours, &c.,

[SEAL.] J. B. THORNTON,
Second Comptroller.

Paragraphs 1142 and 1143 of the Navy Regulations of 1865 provide as follows:

1142. The allowance for the traveling expenses of officers of the Navy within the United States is fixed by law at ten cents per mile. For traveling out of the United States the actual expenses only are allowed.

1143. The actual and necessary traveling expenses of officers proceeding from the United States, under orders for foreign service, will be paid upon the production of bills and receipts; or if they shall certify that it was not practicable to obtain receipts, then upon a statement of the actual and necessary expenses, made with as much particularity as may be in their power, and certified to be correct. The traveling expenses of officers returning to the United States from foreign service, under orders, or under permission granted in consequence of sickness or medical survey, will be paid upon the same evidence as is required by the last rule in the case of officers going abroad.

Paragraphs 1491 and 1492 of the Navy Regulations, issued March 31, 1870, are in the same language as last above.

XI.

It was the practice of the Navy Department and the accounting officers for several years prior to the passage of the act of March 3, 1835, to pay only actual expenses for travel at sea and abroad.

XII.

Under the practice of the War Department, prior to and since July 17, 1862, officers of the Army have been allowed mileage for travel under orders out of the United States.

XIII.

Under said practice an advance was made to such officers on account of mileage for travel under orders, whether within or without the United States.

CONCLUSION OF LAW.

On the foregoing facts the court decides as conclusion of law that the claimant is entitled to have and recover from the Department the sum of four hundred and sixty-three dollars and forty cents.

VII. *Opinion of the court.*

Davis, *J.*, delivered the opinion of the court:

In the second section of the act to regulate the pay of the Navy of the United States, approved March 3, 1835 (4 Stat. L., 757), it was enacted that the yearly allowance provided in the act should be all the
12 pay, compensation, and allowance that should be received, under any circumstances whatever, by any officer or person in the naval service of the United States, except for traveling expenses when under orders, for which ten cents per mile shall be allowed.

By the fourth section of the act of April 17, 1866 (14 Stat. L., 38), Congress repealed so much of the second section of the act of 1835 as prohibited allowances to naval officers for rent of quarters, or for furniture, or for lights, or for fuel, or for transporting baggage.

By the third, fifth, and seventh sections of the act of July 15, 1870, Congress established rates of pay for officers of all ranks and grades in the Navy, and by the fourth section of that act (16 Stat. L., 332) repealed all laws authorizing additional allowances, except those allowing rations and traveling expenses to officers, and further enacted that their traveling expenses in foreign countries should be construed to include such expenses of transportation of baggage as were necessarily incurred, but that no charge for transportation of baggage in connection with travel in the United States should be allowed.

This was the state of the statute law at the time when the travel took place which forms the subject of this suit. The claimant went to San Franciso via Panama, by order of the Department. The act of 1835 commanded the accounting officers of the Treasury to allow him 10 cents a mile for that travel. The act of 1866 authorized a further allowance for transportation of baggage in case extra expense was incurred on that account. The act of 1870 confined that authority to make such allowance for baggage transportation to travel not within the United States. But as no claim is made for transportation of baggage, this modification of the act of 1835 is unimportant. If the case is to rest upon the legislation of Congress there is no room for doubt as to the rights of the claimant.

The Attorney-General, however, suggests that we should set aside the legislation of Congress and decide this case on a construction of the law by the executive department, which he asks us to find, and we have substantially found, was for over forty years in conflict with the statute as construed by the court. He would have us assume that Congress must have known of the departmental annulling of the legislative will, and decide in substance that because the act of 1835 was not re-enacted by Congress as a renewed expression of legislative will it must be regarded as repealed by departmental regulation.

We cannot give such force to executive construction; and even if we were disposed to do so we should be restrained by an expression of the opinion of the Supreme Court on the exact point raised by the Govern-

ment, which binds us, whatever force it may be supposed to have at the accounting offices of the Treasury.

In the army appropriation act of June 16, 1874 (18 Stat. L., 72), a provision was inserted that only actual traveling expenses should be allowed to any person holding employment or appointment under the United States, and all allowances for mileages and transportation in excess of the amount actually paid were thereby declared illegal. Although contained in an army bill, this sweeping provision operated as general legislation affecting the Navy as well as the Army.

As if to correct this inadvertent legislation, Congress, by the naval appropriation act of June 30, 1876 (19 Stat. L., 65), enacted that "So much of the act of June sixteenth, one thousand eight hundred and seventy-four, making appropriations for the support of the Army for the fiscal year ending June thirtieth, one thousand eight hundred and seventy-five, and for other purposes, as provides that only actual traveling expenses shall
13 be allowed to any person holding employment or appointment under the United States while engaged on public business, as is applicable to officers of the Navy while so engaged, is hereby repealed, and the sum of eight cents per mile shall be allowed such officers while so engaged in lieu of their actual expenses.

In 1878 Commodore Temple, by orders of the Navy Department, traveled from New York to Montevideo and back. The accounting officers allowed him his traveling expenses, which were less than eight cents per mile. He demanded the statutory pay of eight cents per mile, and on refusal brought suit in this court. We gave judgment in his favor (14 C. Cls. R., 377). The Government appealed and the Supreme Court unanimously affirmed the judgment in this court. (Temple's Case, 105 U. S. R., 97.) In the opinion the court expresses its views upon the act of 1835, and upon the conduct of the accounting officers in construing it. The court say—

"The law as it stood when the travel was performed was explicit, and is not open to construction. * * * When this travel was performed there was not a line on the statute books of the United States which made any provision whatever, under any circumstances, for allowing officers of the Navy, when engaged on the public business, their actual expenses of travel. The only law ever enacted which made such provision had been expressly repealed by the act on which the appellee based his claim for mileage. This act declared him entitled, without condition or limitation, to mileage at the rate of eight cents per mile, and is the only law on the subject. * * * The attempt to justify the decision of the accounting officers of the Treasury is based on an alleged practice in conformity therewith which it is said grew up in the Navy Department under the act of 1835. The practice, if such there was, finds no higher warrant or sanction in the act of 1835 than in the act of 1876. * * * The law on which the appellee bases his claim is plain and unambiguous. We must give it its natural and obvious meaning, and thus interpreted it leaves the applicant no ground to stand on."

In the appeal of the Swift, Courtney and Beacher Company's case, reported in the same volume (105 U. S. R., 691), the Supreme Court say:

"The rule which gives determining weight to cotemporaneous construction put upon a statute, by those charged with its execution, applies only

in cases of ambiguity and doubt." (Edwards' Lessee *v.* Darby, 12 Wheaton, 206; Smythe *v.* Fiske, 23 Wall., 374; United States *v.* Moore, 95 U. S., 760; United States *v.* Pugh, 99 *id.*, 265.)

The Supreme Court has said of a law parallel in every respect with that which we have now to construe that it is plain and unambiguous, and leaves the government resisting it no ground to stand on. This emphatic language leaves no possible excuse for resorting to cotemporaneous executive construction.

Judgment will be entered in the claimant's favor for four hundred and sixty-three dollars and forty cents.

14 VIII. *Final judgment.*

At a Court of Claims held in the city of Washington, on the 22d day of January, A. D. 1883, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said James D. Graham do have and recover of and from the United States the sum of four hundred and sixty-three $\frac{40}{100}$ dollars.

15 IX. *Application of defendant for an allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 22d day of January, 1883, in favor of claimant, the defendants, by their Attorney-General, on the 19th day of April, 1883, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed April 19, 1883.
Allowed.

16 X.

JAMES D. GRAHAM
vs.
THE UNITED STATES. } No. 11957.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment, of the application of defendants for allowance of appeal to the Supreme Court of the United States, and of the allowance of the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 22nd day of September, 1883.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsement on cover:) Court of Claims. No. 1124. The United States, appellant, vs. James D. Graham. Filed 12th October, 1883.

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In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES, APPELLANT,
vs.
JAMES D. GRAHAM.
} No. 1124.

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR THE UNITED STATES, SUBMITTED UNDER RULE XX.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES, APPELLANT,
vs.
JAMES D. GRAHAM. } No. 1124.

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR THE UNITED STATES, SUBMITTED UNDER RULE XX.

STATEMENT.

Graham, an officer of the Navy, went under orders from New York to San Francisco, via Panama. He was furnished with transportation by the defendants at a cost to them of $150. He traveled 6,134 miles, and completed his journey September 16, 1872.

The court below gave him $463.40 ($613.40 minus $150), holding him entitled to ten cents per mile, under section 2, act March 3, 1835 (4 Stat., 757).

Finding 10 shows that prior to the act of 1835 the rules of the Navy Department made a distinction between travel within the United States and travel abroad, allowing in the latter cases the passage-money instead of mileage, and that the Treasury Department established substantially the same rule on April 6, 1835. Also that the Navy regulations of 1865 and 1870 continued this distinction.

Findings 7 and 8 show that the practice of the Navy and Treasury Departments prior to the decision in Temple's case (105 U. S., 97) was to pay traveling expenses instead of mileage to officers for travel abroad under orders, construing the act of 1835 and subsequent acts to apply only to travel within the United States.

Temple's case rested on the act of June 30, 1876, and presented, as we shall contend, a different question. At all events the Treasury Department, finding many claims presented under the legislation prior to the act of 1876, and thinking that it was desirable to obtain the opinion of this court as to the existence of any valid distinction in such cases, desired the facts to be more fully presented, and this appeal to be brought from the ruling of the court below.

ASSIGNMENT OF ERRORS.

The conclusion of law stated and judgment entered in accordance therewith is assigned for error.

BRIEF.

I.

This case is not governed by that of Temple. Temple sued for eight cents a mile, under the act of June 30, 1876, and the defendants in argument relied on or referred to the practice of the Navy Department under the act of 1835. This court said in substance, in answer thereto, that there was no evidence before it of the existence of the alleged practice, and that if there were the practice finds no higher warrant in the act of 1835 than in the act of 1876. The real point of the decision, we submit, was that the act of 1876 was too plain for construction, and that reference to the act of 1835 and the practice under it was immaterial.

II.

Even if the act of 1835 was involved in the decision in that case the particular facts and legislation here concerned present a different case, as we contend.

It should be premised that there is no inherent unfairness to the claimant in the position of the accounting officers. Common sense would suggest that if an officer traveling under orders has his actual and necessary expenses allowed he has no ground of complaint. While, therefore, he must be paid whatever the law prescribes, be it more or less than a just advance or reimbursement, it is to be borne in mind that the Navy and Treasury Departments, even if in error, have not been for forty years

inforcing an inherently unjust regulation against naval officers.

The presumably high character of the administrators of those Departments during the period in question should induce respect for their judgment as well as their motives, and to this consideration the fact that, so far as appears, no objection to the departmental construction was interposed from 1835 until 1878, for no suit was sooner brought, adds such weight as should suffice, we submit, to secure for that construction a careful reconsideration of the judgment in this court.

The secret of the aquiescence of the officers concerned in the Departmental rule for so many years lies manifestly in the fact that the construction was originally, and until perhaps a comparatively recent period, in their interest. This is shown by the opinion of Attorney-General Légare, to whom the matter was referred in 1842 (4 Op., 95). It is plain from what he says that applying the mileage allowance in cases of foreign travel would have required officers to contribute a large part of the expense from their own means, or in case of their inability to so respond would have brought the service to a stand. The case mentioned in Finding 7 shows that as to sea-travel this condition of things prevailed at least as late as 1870 in some quarters, though in that case mileage only was allowed on the theory that the travel was substantially within the United States.

The conditions of foreign travel have materially changed, however, since steam navigation has been so greatly extended, and on the main routes competition has so reduced the rates of passage that the mileage will in some cases exceed the actual cost, and hence these claims. It

ought not to be surprising that the Department officers should be unwilling to discard a construction and practice so long maintained for the officers' benefit, and that not because it now does any injustice but because some officers can now reap a personal advantage by the change. If the court below is right they have been paying officers since 1835 more in general than their lawful allowance for foreign travel in paying their traveling expenses, and in a controversy that involves the unsettling of accounts for so long a period they naturally desire their course to be determined by the judgment of this court.

III.

It is not necessary to consider at length the propriety of the construction put by the Departments on the act of 1835 at the time of its passage, and so long maintained, because this case (arising in 1872) may be determined by subsequent legislation.

The Department (and Navy) officers evidently considered at the time the act was passed that it would lead to such inconvenience, absurdity, or injustice, as applied to foreign travel, that such application could not have been intended by Congress. The reasons for this may not be so apparent now, but that they were deemed cogent in 1842 the opinion of Attorney-General Legare shows.

There is no lack of judicial authority for modifying the plain language of a statute under such circumstances, though the tendency of the courts, it must be admitted, has been more and more in favor of adherence to the literal sense of an enactment without regard to the consequences. (See authorities cited in Sedgwick on Stat. and Court Law, pages 299 to 305.)

IV.

The first act to be noticed after the statute of 1835 is that of July 14, 1862 (Sec. 5, 14 Stat., 565). It provides:

> That the orders, regulations, and instructions heretofore issued by the Secretary of the Navy be, and they are hereby, recognized as the regulations of the Navy Department, subject, however, to such alterations as the Secretary of the Navy may adopt, with the approbation of the President of the United States.

This court has said that regulations established under this authority have the force of law (100 U. S., 22), and there had been, as the record shows, regulations making a distinction as to the manner of payment in case of foreign travel from at least 1832, which it is not extravagant to assume that Congress must have known.

But supposing the regulations to be law only when not inconsistent with acts of Congress on the same subject, we find the intent of Congress illustrated by the acts of April 17, 1866, and July 15, 1870.

The former provides that so much of the second section of the act of March 3, 1835, as prohibits allowance for rent of quarters or of furniture, or for lights, fuel, or transporting baggage, be repealed. As these had never been statutory allowances the effect of this was to restore to the Departmental officers to some extent the authority of which they had been deprived by the act of 1835, and to indicate the disposition of Congress to recognize the propriety of past Departmental action in particulars certainly not better justified than in the practice in question.

The act of 1870 seems to go farther and shows, we sub-

mit, that Congress not only was aware of that practice but recognized it as subsisting and valid by so framing its enactment as to make it not fairly explicable on any other assumption.

The act, after prescribing the pay of officers, proceeds as follows: (Sec. 4.)

> "That the pay prescribed in the next preceding section shall be the full and entire compensation of the several officers therein named, and no additional allowance shall be made in favor of any of said officers on any account whatever, and all laws or parts of laws authorizing any such allowance shall on the first day of July, 1870, be repealed; but this shall not be construed as repealing existing laws allowing rations and traveling expenses to officers; *and their traveling expenses in foreign countries shall be construed to include such expenses of transportation of baggage as were necessarily incurred; but no charge for transportation of baggage in connection with travel in the United States shall be allowed.*"

Apparently the only acts of Congress authorizing allowances in addition to pay (and rations) were the acts of 1835 and 1866, and the effect of the section down to the italicized portion seems to be to repeal the provision of 1866, and also the second section of the act of 1835, except in so far as it relates to traveling expenses.

Any allowance for transportation of baggage is specially forbidden by the act of 1835, and the Department officers, as the ninth finding shows, had not allowed it (even after the act of 1866) in cases of travel abroad, any more than at home.

The italicized portion of the act of 1870 shows that Congress intended to modify the prohibitions of the act

of 1835 and the practice under the act of 1866 so as to require the allowance of expenses of baggage transportation necessarily incurred in addition to the traveling expenses that had been allowed to officers traveling under orders in foreign countries.

It is unreasonable to suppose that when doing this they did not know the distinction that had existed for thirty-five years in allowing by Departmental construction of the act of 1835 actual traveling expenses (except for baggage) in foreign travel, and in confining the mileage allowance to home travel; and their language shows, we submit, very plainly, that they did know it.

If they had supposed that the law and practice had been to pay *mileage* abroad their intent would have been to give the baggage allowance in addition to mileage, but that intent would naturally have found expression in very different terms, whereas the terms employed are not only inapt but would defeat the supposed purpose; for the act of 1835 cuts off all allowance "except for traveling expenses when under orders, for which ten cents per mile shall be allowed," and a mere construing or defining of the phrase "traveling expenses," by stating what it shall include, only shows what the allowance of ten cents per mile must cover instead of adding a further allowance.

But on the assumption that Congress considered that by Departmental construction of the act of 1835 or otherwise officers were entitled to "their traveling expenses in foreign countries," but that in consequence of the express *exclusion* of baggage expense in the act of 1835 it was necessary to expressly "*include*" it in 1870 in order to authorize the accounting officers to pass it as among the

"traveling expenses," every word in the clause is significant and the intent transparent.

Assuming, then, that the act of 1835 does not of itself warrant the distinction made and maintained by the Departments, the important question here is how does this knowledge and action of Congress in 1870 affect this claim for mileage on travel in 1872.

It will not be questioned that Congress could have said "all laws relating to allowance of mileage to officers of the Navy shall be construed to allow traveling expenses in foreign countries," but is that requisite if it is apparent that Congress understood or assumed that to be the existing law and further legislated on that basis? No doubt the courts will not admit a Departmental construction as against a clear statute, but Congress can recognize and validate it expressly or impliedly as well if the circumstances are such as are consistent only with that intent.

Their persuasive force in the present case is strengthened by the considerations that no injustice to the officers would result, while the Government will be protected from the payment of claims made long after the accounts between the parties were settled and closed, and in which there is no substantial equity unless it can be maintained on general principles that the Government owes the officer something more than reimbursement in such cases.

This reasoning, as before remarked, is not affected by the decision in Temple's case, because of the intervention of the act of 1874 (18 Stat., 72), which swept away al mileage, and the act of 1876 (19 Stat., 65), which repealed it as respects the Navy, and laid down a new rule under which Temple's case arose. This court justly said that as

the statute of 1876 was clear it could not be affected by proof of the prior practice of the Departments. The question here is as to legislative recognition of a subsequent construction and practice of thirty-five years, shown first by recognition in 1862, of the regulations which affirmed it, and by the clause cited from the act of 1870.

The only act not before mentioned respecting mileage is that of July 17, 1862 (sec. 7, 12 Stat., 595; R. S., sec. 1566), which provides that "no officer of the Army or Navy of the United States shall be paid mileage except for travel actually performed at his own expense, and in obedience to orders."

As to Army officers this section makes the distinction: "when transportation in kind is not furnished to them by the Government." In this case transportation was so furnished, and therefore the officer did not literally perform the travel at his own expense, and whether he claimed, or was able, to do so does not appear. If there is no escape from the letter of the act of 1835, in view of all that has been said, a similar literal rendering of the law may not unreasonably be applied, we submit, to the case of an officer suing after six years from the date of the service, to recover upon a matter that had been settled and closed at the time apparently to his satisfaction.

S. F. PHILLIPS,
Solicitor-General.
THOMAS SIMONS,
Assistant Attorney-General.

○

110-219

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In the Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 1,124.

THE UNITED STATES *vs.* JAMES D. GRAHAM.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

The question in this case is whether that portion of Sec. 2 of the Act of Congress of March 3, 1835, (4 Stat., 757) allowing naval officers ten cents per mile "for traveling expenses under orders" applied only to travel under orders within the United States, or embraced, also, travel under orders abroad. The appellants seek to restrict the allowance to the former case, and rely on a regulation and a custom of the Navy and Treasury Departments, which so confined it. In United States *vs.* Temple, (105 U. S. R., 97,) attention was called to this custom, and the Court incidentally said that it was unwarranted by anything in the Act of 1835, and could not affect the construction of the similar Act of 1876, governing the Temple case, which was declared to be plain and unambiguous.

The Act of 1835 was equally unambiguous, and no amount of contemporary executive construction can affect it.

Edwards' Lessee *vs.* Darby, 12 Wheaton, 206;
Smythe *vs.* Fiske, 23 Wall., 374;
U. S. *vs.* Moore, 95 U. S., 760;
U. S. *vs.* Pugh, 99 *Id.*, 265;
Swift, Courtney & Beecher *vs.* U. S., 105 U. S , 691.

The course of legislation on this subject is clearly shown in the opinion of the Court below. (Record, p. 7.) In 1835, Congress authorized mileage for travel under orders, but prohibited all other extra allowances. In 1866, (14 Stat., 38,) this prohibition was repealed so far as it affected allowances for the transportation of baggage

The Executive was thus at liberty to allow or not, in his discretion, the expenses of transportation of baggage, in addition to mileage, and neither the compulsory allowance for mileage nor the permissive allowance for baggage were restricted to home travel. But, in 1870, (16 Stat., 332,) the discretionary baggage allowance was prohibited in the case of home travel, and made compulsory in the case of foreign travel.

The only conclusion which, it seems, could be drawn from this is, that Congress recognized the fact that baggage is usually charged for in foreign countries, while in the United States it is allowed to pass free. It cannot be maintained that congress intended, by the Act of 1870, to ratify the construction limiting the mileage allowance of the Act of 1835 to the case of home travel, and thus, by indirection and by most inapt words to repeal the plain provisions of the Act of 1835.

Attention of the Court is asked to the 7th finding of fact, (Record, p. 4,) from which it appears that the "custom" relied upon by the appellants was not uninterrupted.

The 12th and 13th findings of fact, (Record, p. 6,) show that the custom of the Navy Department differed from that of the War Department, under which army officers were allowed mileage for foreign travel. A course of office practice, or custom, to have weight in the courts, must be uniform in all Departments of the Government.

Morey et al. *vs.* Leach, 3 Burr., 1767.

Respectfully submitted.

ROBT. B. LINES,
JOHN PAUL JONES,
For Appellee.

110-219

Supreme Court of the United States.

OCTOBER TERM, A. D. 1883.

No. 1124.

THE UNITED STATES,
Appellants.

vs.

JAMES D. GRAHAM,
Appellee.

Appeal from the Court of Claims.

BRIEF IN SUPPORT OF THE APPELLEE.

Submitted by consent of the Honorable Attorney-General, as counsel for the Appellants, and of Robert B. Lines and John Paul Jones, Esquires, as counsel for the Appellee.

CHARLES F. BENJAMIN,
Attorney and Counsellor.

WASHINGTON:
GIBSON BROTHERS, PRINTERS.
1883.

Supreme Court of the United States.

October Term, A. D. 1883.

THE UNITED STATES
versus
JAMES D. GRAHAM.
No. 1124.

Appeal from the Court of Claims.

BRIEF IN SUPPORT OF THE APPELLEE.

Summary of the Argument.

1. The intention of the navy mileage act of 1835, whether gathered from its language or from a view of the pre-existing regulations, was to establish a single, uniform measure of allowance for travelling expenses, wheresoever and by whomsoever an official journey should be performed.

2. The Treasury circular of April, 1835, and the navy regulations of 1865 and 1870, so far as they prescribe for the expense of travel abroad a different measure of allowance to that prescribed by the act of 1835, are void by reason of the provisions of the act of 1835 being plain and unambiguous, and not modified by any statute in *pari materia*.

3. The act of 1866, permitting an allowance to be made for transportation of baggage, is a cumulative statute, not repugnant to the act of 1835, and containing neither an expressed nor implied repeal thereof.

4. The act of 1870 is cumulative towards the act of 1835 in respect of including transportation of baggage in the necessary expenses of travel abroad, and restrictive of the act of 1866 in excluding such items from the necessary expenses of travel in the United States.

5. Even if the Legislature had intended by the act of 1866 or 1870 to repeal the provisions of the act of 1835 as to foreign travel, there has been a failure to execute the intention, and no repeal by expression or implication has ensued.

6. The act of 1835 being expressed in plain and unambiguous terms, and no latent ambiguity appearing, a conflicting usage, practice, or rule of the Executive cannot prevail against it, nor be accepted as contemporaneous construction.

7. There is no presumption that the Legislature has had knowledge of acts of the Executive not required, authorized, or warranted by the law.

8. The argument of inconvenience cannot prevail against a plain and unambiguous statute; nor is it shown here that the act of 1835 would have produced inconvenience if operated according to its terms.

9. The acts of 1835, 1866, and 1870 are fully capable of being construed together without changing the allowance for travelling expenses from a reimbursement to an emolument.

10. The purchase of a passage-ticket for an officer travelling by private conveyance upon the public business does not amount to furnishing him with public transportation, nor impair his right to receive an allowance of ten cents per mile for travelling expenses under the act of 1835.

FACTS.

The navy regulations of 1832 provided four differing rates of mileage for official travel within the United States, the difference in each case depending upon the mode of travel and the rank or grade of the officer. For official travel abroad, actual expenses of travel were allowed by those regulations in all cases.

The act of March 3, 1835, (4 Stat., 757,) provides: "The yearly allowance provided in this act is *all* the pay, compensation, and *allowance* that shall be received *under any circumstances whatever* by any such officer or person, except for *travelling expenses* when under orders, for which ten cents per mile *shall* be allowed.

The Treasury circular of April 6, 1835, prescribes mileage for official travel within the United States, and actual travelling expenses for official travel abroad.

The navy regulations of 1865 provide the same as the Treasury circular.

The act of 1866 (14 Stat., 38) provides: "So much of the second section of an act entitled, [&c.,] as prohibits any allowance to any officer in the naval service for * * transporting baggage, * * be and the same is hereby repealed."

The navy regulations of 1870 (published March 31st) are in the same language as those of 1865, above cited.

The act of July 15, 1870, (16 Stat., 332,) provides: "This shall not be construed as repealing existing laws allowing * * travelling expenses to officers, and their travelling expenses in foreign countries shall be considered to include such expenses of transportation of baggage as were necessarily incurred, but no charge for transportation of baggage in connection with travel in the United States shall be allowed."

The foregoing statement comprises all the laws and regulations enacted and prescribed up to the time when the appellee, an officer in the navy, made an official journey, under orders, from Washington to the Navy Yard at Mare Island, by way of New York and the Isthmus of Panama. He was paid mileage at the rate of ten cents per mile for the distance from Washington to New York, and from New York to Mare Island a passage ticket was bought for his use by the appellants, and he received nothing further.

ARGUMENT.

The plain intent of the act of 1835 was to substitute the "yearly allowance" therein provided for "all the pay, compensation and allowance" theretofore granted, except as to travelling expenses, "for which ten cents per mile shall be allowed."

Taking that statute by its four corners, does it not unquestionably mean, firstly, that the allowance for travelling expenses should be the only kind of allowance which was not "yearly;" and, secondly, that the sole measure of that intermittent allowance should be "ten cents per mile?"

If we go for a moment outside of the statute and look at the regulations of 1832, with their two classes of travel, (domestic and foreign,) their two modes of travel, (by land and by water,) and their two scales of allowance, (one for captains, masters, and judge-advocates not of the navy, and the other scale for all other grades and ranks,) are we not strengthened and confirmed in the interpretation which the clear and complete language of the statute invites? The regulations of 1832 were complex and varied; the act of 1835 was simple and uniform, and was thus a distinct step forward in the path of administration, according to the popular view then and now prevalent touching the science of government.

Seeing that the regulations of 1832 were supplanted by the act of 1835 in language too full and explicit to leave room for doubt as to the meaning and purpose of the act, whence did the Treasury officers derive authority to prescribe (as they practically did by their circular of the month following the passage of the act) that the obsolete regulation should continue to be enforced as to travel abroad and the statute observed only as to travel within the United States? Did they rely upon some statute subsequent to, or in *pari materia* with, the act whose provisions they were setting aside? If so, where is it? Perhaps they proceeded in supposed conformity to the legal doctrine governing the interpretation and construction of

statutes. But if their action be put upon that ground, what are we to do with such authoritative expositions of that doctrine as the following:

"If the words of the statute are in themselves plain and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words, *themselves alone*, do, in such case, best declare the intention of the lawgiver." (Tindal, C. J., Sussex Peerage, 11 C. & F., 86, 143.)

"Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and, consequently, no room is left for construction." (Washington, J., United States *vs.* Fisher, 2 Cranch, 399.)

"The law, as it stood when the travel was performed, was explicit *and is not open to construction.* * * Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation. * * The law on which the appellee bases his claim is plain and unambiguous. We *must* give it its natural and obvious meaning." * * (Woods, J., United States *vs.* Temple, 105 U. S., 97, 99.)

In view of the act of 1835, the absence of any modifying statute, and the settled rule for the construction of plain and unambiguous statutes, who can doubt for one moment that the provisions of the Treasury circular of April 6, 1835, in respect of travel abroad, were illegal and are void? And equally illegal and void were the navy regulations of 1865 touching the same subject, for no administrative rule made by authority and in pursuance of law can override the law or modify a plain and unambiguous statute. The doctrine of *pari materia* does not apply in a case of conflict between a statute and an executive regulation.

II.

The act of 1866 selects and names for repeal a part of the same section of the act of 1835 as contains the provisions re-

lating to travelling expenses, and the part to be repealed is clearly pointed out and limited by the act of 1866. It does not include any of that portion of the section which says, "for travelling expenses when under orders * * ten cents per mile shall be allowed." Consequently, if there was any repeal of our part of the statute of 1835 by the act of 1866 it must have been by implication. But it would be unreasonable to suppose that the Legislature meant to repeal one part of a statute by express enactment and another and cognate part by implication, by force of one and the same repealing statute, unless the provisions of the repealing statute were repugnant to the parts of the statute not expressly repealed. Repeals by implication are disfavored by the courts.

"Forasmuch as acts of Parliament are established with such gravity, wisdom, and universal consent of the whole realm for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent act, to be abrogated." (Coke, C. J., 11 Rep., 63.)

With rare and unimportant exceptions the courts of England and the United States have never failed to hold firmly to the doctrine of repeal as thus expounded by Lord Coke.

There is nothing repugnant in the respective provisions of the acts of 1835 and 1866. Taking them together, they provide that for travelling expenses under orders ten cents per mile shall be allowed, and that an allowance for transportation of baggage may be made. The silence of the act of 1866 as to the cases in which, and the conditions upon which, an allowance for transportation of baggage might be made, imposed upon the Executive the duty and power of prescribing such cases and conditions; but the grant of such power could not justify the practical repeal of the act of 1835 under guise of executing the act of 1866. The Executive was at liberty to make an allowance for transporting baggage, but was not at liberty to withhold the allowance of ten cents per mile. Nor

is there anything unreasonable in this view of the intent of the act of 1866. That act did not confer a right to a baggage allowance upon everybody who might be entitled to receive ten cents per mile under the act of 1835; it merely authorized, without requiring, an allowance, and it may well be supposed that the Legislature expected the Executive to so use the discretion conferred as to make allowance for transporting baggage only in cases where the ten cents per mile should fail to meet the actual and necessary expenses of travel.

It is not to be presumed that there will be a serious contention from any quarter that the act of 1866 amounted to a ratification of the construction placed by the circular of the Treasury officers upon the act of 1835. Such a contention would fail upon two grounds, either of them conclusive.

1. The act of 1835, being plain and unambiguous, is not susceptible to construction derived otherwise than from its own language.

2. The act of 1866, being consistent in text and spirit with the act of 1835, is not available for the nullification of that act by either a direct or indirect course of reasoning.

The navy regulations of 1870 being merely reproductions in letter and spirit of the regulations of 1865 must fall with the latter, because between 1865 and 1870 no legislation occurred to give the regulations of 1870 any better standing than their predecessors had.

III.

The act of 1870 is the latest expression of either legislative or executive will prior to the occurrence of the facts out of which this cause arose. That act provided in substance that travelling expenses abroad should be considered to include necessary expenses of transportation of baggage, but that charges for transportation of baggage in the United States should not be allowed. This statute was both a restriction and an enlargement of the act of 1866. It took away in every case the authority of the Executive to make an allowance for baggage

when travel should be performed in the United States. It gave to every officer performing travel abroad under orders the right to have the necessary cost of transporting baggage considered as a part of his travelling expenses. It did not, *ipso facto*, give him the right to have an allowance for baggage in addition to the ten cents per mile prescribed by the act of 1835; but if the ten cents per mile should be insufficient to cover his necessary travelling expenses, including expenses of baggage, he would have a right to apply for and receive so much as with the ten cents per mile would make him whole. If this view be correct, the act of 1870, like the act of 1866, is quite consistent with the act of 1835, and cannot be invoked to confirm administrative regulations in conflict with the last-named act. Let us consider if it be a reasonable view.

The obvious intent of the act of 1835, in its entirety, (4 Stat., 755,) was to substitute an annual salary, in company with a daily ration, for all previously existing modes and measures of compensation, except as to reimbursement of travelling expenses; and as to those a uniform measure of compensation was provided for all persons and all kinds of official travel. Doubtless it was intended and expected that ten cents per mile would, with rare exceptions, meet and defray the expenses of travel in all classes of cases. The act of 1866 provided for the exceptional cases where the cost of transporting authorized baggage added to the cost of transporting the officer caused the mileage allowance to prove insufficient. The act of 1870 restricted this exceptional provision of 1866 to cases of travel abroad, possibly because the authority conferred by the act of 1866 had been abused; probably because a baggage allowance within the United States was seen to be wholly unnecessary, and it was thought well in a statute resettling the allowances of navy officers to repeal the redundant legislation.

But whether or not the foregoing be the correctly stated grounds of the legislation of 1866 and 1870, it is equally certain that the act of 1835 is a plain and unambiguous statute, never expressly repealed, and fully capable of being practically

applied in company with the acts of 1866 and 1870. Consequently it applied to the appellee, who was not only entitled to its benefits, but was bound by its restrictions, as modified by the acts 1866 and 1870.

IV.

What has been said immediately above completes a review of the legislative and executive provisions touching travelling expenses for foreign travel under orders. It may be worth while to consider, briefly, some of the arguments which will probably be relied upon by the appellants.

First in importance is the probable argument that the operation of the law has become settled by long-continued usage, and cannot now be changed to conform to its original intention if it should be held that such intention has not been observed. In a case of either patent or latent ambiguity, or other form of doubtful expression, this would be a supreme argument. But with regard to a statute neither obscure nor ambiguous, we have the following statement of the law from this honorable court:

"The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt." (Matthews, J., Swift Co. *vs.* United States, 105 U. S., 691, 695.)

This exposition of the law agrees with that formulated in the House of Lords:

"It [usage] can be binding and operative upon the parties only as it is the interpreter of a doubtful law, as affording a contemporaneous interpretation; but it is quite plain that, as against a plain statutory law, no usage is of any avail." (Lord Brougham, Dunbar *vs.* Roxburghe, 3 C. & F., 335, 354.)

In the case of The India, (B. & L., 221,) it was held that no statute can lose its force by non-user alone.

Next is the argument of inconvenience, as justifying the

construction given to the act of 1835 by the Treasury circular of the month next succeeding its enactment, and as requiring the confirmation of that construction now. There is no inconvenience discernible in the statute itself, and we have nothing more to go upon than a prediction of Mr. Attorney-General Legare, (4 Op., 95,) that the statute would "produce the gravest practical inconvenience and absurdities" if construed as its language imported; but if the language of the statute admits no doubt of its requirements, the argument of inconvenience is one for the ears of the Legislature and not the courts. In the preceding pages of this brief an attempt has been made to show that no necessary inconvenience attended this statute if operated according to its terms, and even Mr. Attorney-General Legare offered no illustrations of actual inconvenience.

Next comes the argument that the Legislature must be presumed to have known the existence and terms of the Treasury circular and the navy regulations, and to have framed the acts of 1866 and 1870 with reference to such knowledge. On this point we have a singularly appropriate utterance by this honorable court:

"The decisions of the Internal Revenue Commissioner can hardly be denominated judicial constructions. That officer was not required by the law to prescribe what returns savings banks were required to make. That was prescribed by the act of Congress itself, and he had no power to dispense with the requisition. There is, therefore, no presumption that his decisions were brought to the knowledge of Congress when the act of 1870 was passed." (Strong, J., Savings Bank *vs.* United States, 19 Wall., 227, 237.)

Mutatis mutandis, we have in this exposition the precise legal status of the Treasury circular and the navy regulations in respect of the act of 1835. The authors of those prescriptions were "not required by the law to prescribe" how travelling expenses should be measured and ascertained. "That was prescribed by the act of Congress itself," and hence there

is no presumption that Congress knew of the existence of administrative decisions at once unnecessary and uninvited. Whenever the courts shall begin to impute knowledge by the Legislature of Executive constructions of statutes not open to construction, every statute will become in effect an expression of the executive instead of the legislative will, and, from that stand-point, the formal transfer of the legislative power to the Executive would be but a step or two further.

"The orders, as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinions of them." (Woodbury, J., Greely *vs.* Thompson *et al.*, 10 How., 225, 234.)

Even if Congress could be presumed to have knowledge of the circular and regulations hereinbefore mentioned, and to have intended a repeal of the act of 1835, such intention failed of performance. There has been no express repeal, and, in fact, the act of 1870 expressly says: "This shall not be construed as repealing existing laws allowing * * * travelling expenses to officers" * * * Mere intention to repeal does not amount to repeal by implication; even the recital, in a subsequent statute, of an intention to repeal a former specific statute, will not operate, by implication, to repeal the former statute.

Mahony vs. *Wright*, 10 *Ir. C. L. R.*, 420, *Q. B.*

Perhaps it will be suggested that to allow ten cents per mile under the act of 1835 and expenses of transporting baggage under the act of 1870 would be to turn that into an emolument which was only intended to be a reimbursement. But the answer to such a suggestion is, firstly, that it is only such expenses of transportation of baggage as are "necessarily incurred" which are to be "considered;" and, secondly, that such expenses are not to be settled by themselves—apart—but are merely to be included in the travelling expenses of the

officers owning the baggage; so that any officer claiming a baggage allowance would have to exhibit his entire account of travelling expenses, to be off-set by the full amount of mileage paid or due to him, and could only receive the excess of the cost of transporting himself and his baggage over the amount of his mileage.

The last, and probably the least, argument to be anticipated, is that the appellee did not incur any "travelling expenses," because a passage was obtained for him in a steam-packet at the cost and charge of the appellants. The most obvious reply to such an argument would be that the act of 1835 does not expressly or impliedly require that an officer shall expend his private means for travelling expenses before becoming entitled to the allowance of ten cents per mile, but only that he shall receive, and that there shall be allowed to him, ten cents per mile "for travelling expenses when under orders." The letter and spirit of the act are as well satisfied by the payment of the allowance beforehand to meet the expenses of the journey as they arise as by its payment after the travel is completed. The object of the act is to provide a uniform and constant rate and measure of reimbursement for travelling expenses in lieu of the separate and varying measures resulting from the previous usage of auditing and settling each individual account according to its own circumstances, (whereby wide doors were opened to accident, mistake, fraud, favoritism, and prejudice,) and whether the allowance shall be made before or after the journey is left, so far as the act of 1835 is concerned, to Executive regulation.

Secondly, the furnishing of a passage-ticket is nothing more than the selection of a convenient mode for determining, or aiding to determine, the amount of the "advance" to be made to an officer ordered on foreign service. Mileage is as common an allowance in the army as in the navy, and the custom of making an advance to an officer ordered to a distant post, without affecting his claim to mileage, is both ancient and familiar.

Can it be supposed that the furnishing of a passage-ticket to an officer would operate as an estoppel to a demand for a refund of its cost if it should subsequently appear that he was not entitled to travel at the public expense on the particular occasion for which the ticket was furnished?

An officer travelling in a vessel not owned, operated, or controlled by the United States, cannot rightly be said to have been provided with public transportation, and the law seems to contemplate no middle course between transporting him in a public ship, with the guarantees of safety, comfort, and dignity implied by the ownership or control of the Government, and giving him a money allowance and letting him make his own way to his prescribed destination.

An order of the Secretary of the Navy to an officer thereof to take passage in a designated packet at a specified time for a certain destination, and to apply to a particular paymaster for a passage-ticket conformably to the other prescriptions of the order, is a valid command according to the discipline of the public service, for the Secretary has a right to impose his own judgment upon the officer touching the best means of insuring the placing of the latter at some station where he wishes him to serve the public interest, and also a right to limit the amount of public money that shall be expended in advance of any benefit therefrom; but if the purpose of such an order be to evade the distinction created by law between travel performed on public and on private vessels, the order is void as to such purpose, and equally void is an attempt after the fact to give such an effect to such an order.

Respectfully submitted.

CHAS. F. BENJAMIN,
Counsellor, &c.

110-222

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1883.

ROBERT E. JENKINS, as Assignee of SAMUEL J. WALKER, Bankrupt,
Plff. in Error,

vs.

BERTHOLD LOEWENTHAL, THE INTERNATIONAL BANK OF CHICAGO, C. EDWARD SCHOELKOPF, AUGUSTUS BAUER, JACOB ROSENBERG, AMOS P. GRAY, THOMAS H. SHEPPARD and LOUIS SANDS,
Deft's in Error.

No. 1232.
In Error to
Supreme Court.
Of Illinois.

ABSTRACT OF RECORD.

W. T. BURGESS,
For Plaintiff in Error.

CHICAGO ILL.:
S. I. BRADBURY & SONS, PRINTERS, 78 FIFTH AVENUE.
1883

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1883.

ROBERT E. JENKINS, as Assignee of SAMUEL J. WALKER, Bankrupt,
Plff. in Error,

vs.

BERTHOLD LOEWENTHAL, THE INTERNATIONAL BANK OF CHICAGO, C. EDWARD SCHOELKOPF, AUGUSTUS BAUER, JACOB ROSENBERG, AMOS P. GRAY, THOMAS H. SHEPPARD and LOUIS SANDS,
Deft's in Error.

In Error to Supreme Court. Of Illinois.

It is hereby stipulated that this cause shall be submitted to the Court upon the printed abstract of the case prepared by counsel, and that the complete record sent up need not be printed.

Dec. 22d, 1883.

A. M. PENCE,
Counsel for Deft's in Error.
W. T. BURGESS,
Att'y for Plff. in Error.

ABSTRACT OF RECORD.

Placita, June Term, 1882, of the Circuit Court of Cook County, Illinois, M. F. TULEY, Judge, &c.

Bill filed May 27th, 1881, charges:

That April 26th, 1878, Samuel J. Walker, was on his own petition adjudicated bankrupt in District Court of U. S. for N. D. of Ill., complainant elected his assignee, received assignees deed, dated July 31, 1878. That among property scheduled by Walker was that situated in Chicago, Cook Co., Ill., described as lots 21 to 37, inclusive, in block 18 in S. J. Walker's dock addition to Chicago, the title to which was stated in the schedules filed by Walker, to be held by Eli Kinney, to secure any indebtedness due E. Kinney & Co., a firm therein stated to be composed of Eli Kinney, Philander C. Kinney, Francis M. Hurlburt and Wm. R. Lowe, amount of which was unsettled, and subject to a trust deed securing with other property $150,000, held by the International Bank as security, a copy of that part of the schedules being filed with the bill. That Jan'y 9, 1873, S. J. Walker was seized and possessed in his own right in fee, and owned lots 21 to 34 in said block 10, and he and his wife made a deed of that date, recorded Jan'y 21, 1873, whereby they, for the therein recited and pretended consideration of $155,100, conveyed said lots to said Kinney in fee with full covenants of warranty. That S. J. W. was at the time said deed was delivered, indebted to the firm of E. Kinney & Co., whereof Eli Kinney was a member, upon eleven promissory notes, each for $10,000, dated Jan'y 10, 1873, 4 at 8 months, 4 at 12 months and 3 at 15 months from date. That said deed, though absolute on its face, was in fact but a security for the payment of said notes, whereon S. J. W. was at that time indebted, and was not intended to be otherwise than as a mortgage collateral to and securing said debt, and was so accepted and received by said

Kinney, he otherwise paying no consideration whatever therefor, the consideration stated in the deed or any part thereof never having been paid, and he at no time claiming to be the owner of the said lands and premises, said deed being without consideration other than as security for the payment of said debt, evidenced by said notes. That Jan'y 9, 1874, S. J. W. being siezed in fee of lots 35, 36 and 37 in said block with his wife, made to said Eli Kinney, a warranty deed dated that day, and recorded Feb'y 19, 1874, for the pretended consideration therein recited of $31,250, conveying to said Eli Kinney said lots with full covenants of warranty. That this deed, though on its face absolute, was in fact but a mortgage to secure the notes above set forth. That when the petition in bankruptcy was filed, S. J. W. was in possession by his tenants of said lands, or some part thereof, claiming to be the owner thereof. That Kinney had since the making of said deeds to him, on many occasions, both before and after the said Walker was adjudicated bankrupt, and before and after the pretended conveyances of said lands hereinafter set out bear date, stated and admitted that the said deeds from S. J. W. and wife to him, were made to and received by him, only as collateral security for the payment of said notes, and had no other consideration whatever, and complainant not knowing that said Kinney ever did set up any other state of the title in his hands thereto, relied upon that and the statements contained in said schedules relating thereto, as being the true state of the title to said lands in the hands of said Kinney, and was governed thereby in his acts, touching said lands and premises, until after the expiration of two years from the time said deed was made to him as such assignee after which time and on

the 26th day of November, A. D. 1880, he in fact for the first time, learned of the making by said Kinney and others under him, of the deeds hereinafter set out. That by deed dated March 1, 1878, recorded April 6, 1878, Kinney conveyed to John Kyle & Perry J. Donham, as trustees for the benefit of the creditors of E. Kinney & Co., to protect them to the extent of $25,000, against the individual creditors of said Eli Kinney, lots 21 to 36, and S. ½ of 37 in block ten (10). Afterwards by deed dated March 7, 1878, recorded Nov. 9, 1880, Kyle & Donham for some pretended consideration, released said lands to said E. Kinney, from said deed to them. By deed dated March 7, 1878, recorded Nov. 8, 1880, Eli Kinney, F. M. Hurlburt and Wm. R. Lowe, joining with him in the deed, conveyed to Charles L. Burgoyne said lands and premises, that by deed dated March 7, 1878, recorded Nov. 9, 1880, Burgoyne did for some nominal consideration, release and quit claim to Martha L. Kinney, wife of Eli Kinney, said lands and premises. That by deed Nov. 6, 1880; recorded Nov. 17, 1880, Eli Kinney and his wife Martha S. Kinney, for some pretended and nominal consideration, did quit claim said lands and premises to Louis Kuhn. That each and all of said deeds were without any good and valuable consideration in fact, with notice of the rights and equities of said Walker and of complainant, as his assignee in the premises, and in fraud of their rights in the premises, and that complainant had no knowledge of any such deeds, nor of any intention to make any such deeds, until long after the same were recorded as herein stated. That the partnership of E. Kinney & Co. was dissolved about March 1, 1878, and thereupon the entire settlement of the affairs of the partnership, was left

with and committed to said Eli Kinney alone, he in fact having contributed from his own means all of the capital stock invested in said partnership. That the firm of E. Kinney & Co. may have had other notes than those above described, but whether they had or not he cannot say, nor whether they were secured or not by said deeds, but if so secured, which he does not admit, the same never passed out of the hands of said Kinney & Co. or of said Kinney, and never were assigned or tranfered to any of the parties, to whom said lands were conveyed.

That by deed dated 29th Dec. 1871, and recorded January, 1872, S. J. W. and his wife, after reciting the making of three notes by S. J. W., each for $50,000, to his own order at 18 months, with interest at eight per cent., did convey among other lands to John G. Rogers, trustee, said lots 21 to 36, to secure the payment of said notes, in whosesoever hands the same might be, with power of sale, in case default were made in the payment of said notes. That said S. J. W., was then engaged in a course of dealing with the International Mutual Trust Co., whose name has since been changed to the International Bank of Chicago, borrowing large sums of money from it at usurious rates of interest, and in the course of such dealing either for money then or theretofore borrowed of said Bank at usurious rates of interest, on or about the 30th Dec. 1871, made his six notes all dated that day as follows: No. 2,008 for $8,750 at 3 months, No. 2,009 for $10,000 at 30 days, No. 2,010 for $5,000 at 60 days, No. 2,012 for $10,000 at 90 days, No. 2,013 for $16,748 at 3 months, each being payable without grace, and with interest at ten per cent after due for the space of — days, and then a pen-

alty of — per cent., and therewith deposited, and in the body of said notes pledged the said three $50,000 notes recited and set out in said trust deed having indorsed the same in blank, and also the trust deed to Rogers, as security for the payment of said six tones. That subsequently one of said $50,000 notes was surrendered, leaving but two of them secured by said trust deed. That said six notes are claimed to be held by assignment from said Bank as follows: Augustus Bauer, No. 2,012 for $10,000, Charles Edward Schoelkopf, No. 2,010 for $5,000, and No. 2,011 for $5,000, Berthold Loewenthal, No. 2,008 for $8,750, and the Bank holding the residue No. 2,009 for $10,000, and No. 2,013 for $16,748, and on the 29th Aug. 1874, so holding or claiming to hold the same, the said Augustus Bauer filed in the Cook Circuit Court, his bill of complaint against said S. J. Walker and Amanda, his wife, the International Bank of Chicago, Berthold Loewenthal, C. Edward Schoelkopf, and about one hundred other persons.

And afterward Leopold Miller, Jacob Liebenstein, Robert Loebnitz and C. E. Schoelkopf, on the 3d Sept. 1874, filed in said cause their cross bill, against the said Bauer and other persons defendants in original bill, and on the 12th April, 1876, the International Bank filed its cross bill in said cause, against said Bauer and others, and on the 3d day of December, 1875, S. J. Walker filed his cross bill against said Bauer and the bank, Norman Williams and John L. Thompson also filed a cross bill, and Russell M Larned also filed a cross bill, and such proceedings were afterwards had in said cause, that on the 25th day of April, 1878, a final decree was rendered therein, whereby it was among other things found that S. J. W. was indebted to said Bauer upon note

2,010 in $6,264.16. and on note 2,011 in $6,264.16; to said International Bank, on note 2,009 in $20,988.03, and No. 2,013 in $12,531.66; to Loewenthal, on note 2,008 in $12,531.66, for which said notes and trust deed to Rogers were held as collateral security, and directing the land therein and herein above described to be sold to pay said amounts. That on June 18, 1878, S. J. Walker sued out of Appellate Court, First District, a writ of error upon said decree, and a *scire facias* against all the persons, in whose favor a decree had been rendered in said cause against him, which writ of error being still pending and undetermined in said court, complainant was on 17th Dec. 1879, made plaintiff in error in said cause, in place of S. J. Walker, as his assignee in bankruptcy. That after the suing out of said writ of error, and on the 24th June, 1878, Walter Butler, Master in Chancery, etc., proceeded under said decree, and sold said premises in one lot or parcel to Jacob Rosenberg, the vice-president of said bank, who paid no money at such purchase, but the same was struck off and sold to him *en masse*, on a pretended bid of $54,500, as trustee, for the use of the parties in whose favor decree had been rendered in said cause, the said Master in his report touching said sale, filed of record in said cause, the —— day of ———, so stating the fact to be. That after said sale was made, and writ of error pending, the bank filed a petition entitled in said cause of "Augustus Bauer vs. Samuel J. Walker et al.," setting forth among other things, that said lots 21 to 36 had been ordered to be sold by the decree of the court of April 25, 1878; that the same had been sold under said decree to Jacob Rosenberg, in trust for all the parties interested in said securities as found by the court; that on the 24th

June, 1878, a certificate of purchase was issued by said Master to Rosenberg, and that he would not be entitled to a deed until Sept. 28, 1879. That no taxes had been paid on the premises for four or five years; that Walker was insolvent and in bankruptcy; that said premises were going to waste, persons in possession committing waste thereon; that the premises or a large part thereof could be rented to advantage, and praying, among other things, that a proper person might be appointed to rent said premises, and to receive the rents and manage said estate under the order of the court, said petition being duly verified by the affidavit of said Loewenthal filed therewith. That upon said petition on said March 26, 1879, notice of the presentation thereof having been given to complainant as such assignee, and he appearing by his counsel upon such presentation accordingly, an order was entered and made by said court, by which Loewenthal was appointed receiver, for the purpose of managing and taking care of, and protecting said lots of land with others. and renting the same and collecting the rents and dues arising out of said real estate, and was thereby vested with all the rights and powers of a receiver in chancery according to the practice of the court, (he then and there having filed the bond as required by the order of the court,) all contracts entered into by said receiver, and all leases made by him, should first be submitted to the court for approval, and had liberty to apply to court for further directions. That said Loewenthal forthwith entered upon the discharge of his duties as such receiver, took possession of said lands, received rents, issues and profits thereof, has never rendered any account of his receivership, and has not yet been discharged therefrom, and made no report

of any kind as such receiver to the court other than attempts to obtain possession of parts of the land, and obtaining orders thereon. That on Feb. 16, 1880, an agreement was entered into between the said B. Loewenthal, Eli Kinney and Jacob Rosenberg, trustee for the leasing of said lands and premises, subject to the decision of the court upon said writ of error, which agreement was recorded Feb. 27, 1880, and under which leases of said lands and premises were made by said Rosenthal, Loewenthal and Kinney, or some one or more of them, part thereof to Amos R. Gray and Thomas H. Sheppard, and the other part to Louis Sands, under which said leases they have entered, and are now in possession. That said Master, Sept. 27, 1878, made to Jacob Rosenberg a Master's deed, dated that day, conveying said lots to him under such decree and sale. That said deed was made, and is held for the use of persons in whose favor said decree was rendered, and upon and for no other consideration than what springs from bidding off said lands and premises, in or toward the satisfaction of said decrees, for the use of parties interested therein. That various negotiations for settlement of the matters involved in said suits were, while said suit has been pending in said Appellate Court, set on foot by Loewenthal, the president of the bank and others interested with him and it in said lands with said Kinney, and the fact coming to the knowledge of complainant, he caused notice in writing to be served personally on A. M. Pence, Esq., a member of the law firm of Rosenthal & Pence, solicitors for the defendants in error in said suit on the 14th Jan'y, 1880, a letter dated that day, of which the following is a copy.

"Messrs. Rosenthal & Pence, Sol'rs for International

Bank and others: *Gents:* I am told that attempts are being made for a compromise between Eli Kinney and the parties whom you represent of the matters in litigation between them. As Mr. Jenkins, S. J. Walker's assignee in bankruptcy, is also interested in these matters, you are hereby notified not to proceed therein without his consent. Yours, etc.,

"W. T. BURGESS, Sol'r for Jenkins."

That notwithstanding such notice Loewenthal, during Nov., 1880, acting on behalf of himself, the Bank and other persons claiming under said Master's deed, and interested in said suit went to Cincinnati, the residence of said Eli Kinney, and there secretly and without the knowledge or consent of complainant, induced Kinney to give a pretended release of errors in said suit, and Nov. 23, 1880, filed in the Recorder's office a pretended deed purporting to be dated Nov. 6, 1880, and to be made by L. Kuhn to Berthold Loewenthal, and to convey for the pretended consideration of one dollar the said Lots 21 to 36, and S. ½ of 37 to him in fee. That Kuhn did not then have in his possession, and never had or claimed to have or own the said notes, or other written evidences of indebtedness, or any of them made by Walker to E. Kinney & Co., for which said deeds from Walker to Kinney were held as security. That Kinney at no time had any other title to said lands than as security for the payment of said notes made by said Walker, which fact was well known to Loewenthal and his attorneys in that transaction, or they had such notice thereof as should have put them on inquiry as to the fact. That said Kinney at all times retained such notes in his possession, and never assigned or transferred them or any part thereof to any one until on or about the

——day of————A. D. 1881, when he sold, assigned, and transferred the same for a valuable consideration paid to Alpheus C. Badger, who now holds and owns the same. Complainant for a more full and complete statement of the contents of the papers referred to in the bill refers to the same when produced. That on the 3d April, 1879, Loewenthal made and filed proof of a debt or claim for $2,040.30, in favor of him, Loewenthal, against the estate of S. J. Walker in bankruptcy, which proof is now in hands of complainant as such assignee, and thereby Loewenthal on that day became and was charged with notice of the claim of said Walker, to and his interest in said lands. That by means of the premises complainant, as assignee in bankruptcy of S. J. W., hath become and is entitled to said lands as part of the estate of said bankrupt, and that Loewenthal is not, nor are any of the persons through whom he pretends to claim title from Kinney, purchaser or purchasers of lands for a valuable consideration fully paid without notice, and is and are not entitled to hold the same against him, the complainant, but he should be required to release and convey the same to your orator as such assignee. That what, if any, interest, title or estate Loewenthal acquired or holds in said lands, he acquired and holds the same in trust for his defendants, the International Bank of Chicago, Augustus Bauer, C. Edward Schoelkopf as well as for himself, and that he holds the same for his and their joint use and benefit, and in fraud of the rights, estate and interests of complainant as such assignee as aforesaid in the premises. That suit being pending in said Appellate Court upon said writ of error, and not disposed of, he is fearful that the said Loewen-

thal, so having acquired the apparent legal title to said premises through and by means of said conveyance, which on the face of them purport to convey the apparent legal title to said lands, and do not disclose the equities of your orator therein, will, before said writ of error is disposed of, convey away said lands to some innocent third persons, whereby the rights and equities, interest and estate of complainant, as such assignee will be wholly lost and determined, which he believes he will do, unless restrained by order of the Court. That said cause is now under advisement, and complainant believes said decree will be reversed and cause remanded, that complainant is fearful that Rosenberg will before said writ of error is disposed of, sell and convey away said lands to some innocent third person, and thereby complainant lose the benefit of such reversal, and that he will do so, unless restrained by order of the Court.

Prayer. Answer without oath, That the title acquired by Loewenthal to said lands be declared and adjudged to be either a nullity, or to have been acquired and to be held in trust for complainant as such assignee, and Loewenthal be required to convey the same to him as assignee, and in the meantime and until further order of court, that Loewenthal be restrained from selling, etc., said lands, and Rosenberg be restrained, etc., from selling, etc., said lands. That Rosenberg be declared to have acquired said Master's deed subject to the result of said writ of error, and in trust for the Bank, Loewenthal, Bauer & Schoelkopf, and to hold the title acquired thereby subject thereto, and for general relief, makes The International Bank of Chicago, Charles E. Schoelkopf, Augustus Bauer, Jacob

Rosenberg, Amos Gray, Thomas H. Sheppard, Louis Sands, defendants.

Exhibit A. to Bill.

Schedule of "Creditors Holding Securities," gives "E. Kinney & Co., of Cincinnati, Ohio, bankers, as holding debt of $140,000."

Exhibit B. to Bill.

Schedule of "Interest in Land," gives "Dock Lots 21 to 36, inclusive, in Block 10, S. J. Walker's Addition to Chicago. Title held by Eli Kinney to secure any indebtedness due E. Kinney & Co., amount unsettled, also subject to trust deed, securing with other property, $150,000 held by the International Bank as security."

Summons issued May 27, 1881.

Demurrer to bill, filed June 2, 1881.

Answer of Loewenthal, International Bank, Schoelkopf, Bauer & Rosenberg to bill, filed June 23, 1881.

Admit the bankruptcy of S. J. Walker and that complainant elected his assignee. Do not know what schedules were filed by him. Admit S. J. W. was, January 9, 1873, seized and possessed in his own right in fee of the lands described in this bill, and being so seized he and his wife, by warranty deed of that date, recorded 21st January, 1873, conveyed the same to Eli Kinney, and aver it was for a full valuable consideration. Call for proof of Walker's indebtedness to Kinney & Co.; deny that deed was a security for payment of notes described in bill, and that it was accepted by said Kinney solely for that purpose.

Admit deed of January, 1874, but deny it was a security as charged.

Allege that Walker, long prior to filing his petition

in bankruptcy, knew that Kinney claimed to own said premises, and adversely to said Walker, and that complainant at time of his appointment, and ever since, knew "that Kinney claimed said premises adversely to the said Walker, and to his assignee, under and by virtue of the deeds of conveyance aforesaid."

They allege that the pretended cause of action in favor of complainant accrued to or for such assignee at the time of his appointment, and at the time of the deed and conveyance to him as such assignee, and more than two years prior to the commencement of this suit. That he had knowledge of said pretended cause of action more than two years prior to the commencement of this suit. That complainant, two years prior to the commencement of this suit, knew that Kinney claimed said premises adversely under and by virtue of said deeds of conveyance to him. That more than two years prior to the commencement of this suit he was put upon inquiry as to the estates, right or title, claimed by said Kinney in and to said premises, and by reasonable diligence he could, more than two years prior to the commencement of this suit have ascertained the claim of said Kinney upon said premises. That more than two years prior to the commencement of this suit he had actual knowledge of the pretended cause of action now asserted by him. That he has no cause of action against them as set out in his bill of complaint. That the supposed cause or causes of action in said bill mentioned did not nor did any or either of them accrue to complainant at any time within two years next before the commencement of this suit; and they rely upon the statute of the United States in that behalf, provided in like manner as if they should have specially pleaded the same in bar

of said bill of complaints, and to said pretended cause of action.

Admit conveyance of Kinney to Kyle & Donham, its record, and that it was made for the purpose charged in the bill; and allege complainant, when he received his deed as assignee, had notice of said conveyance, and that said Kinney claimed said premises adversely to Walker and to him. Admit the other deeds set out in the bill of complaint, but deny that they are without consideration, and allege complainant had actual knowledge of all of them when made; and that the deed from Eli Kinney to Burgoyne, and from Burgoyne to Martha S. Kinney, set out in bill, were for a valuable consideration; that she took said premises without any knowledge on her part of the pretended claim set up by claimant, and believing that Eli Kinney was the owner thereof, and had the right to convey the same to Burgoyne, and that Burgoyne had the right to convey the same to her; that the consideration for said conveyance to her through said Burgoyne was fully paid at time of conveyance to her, and was not a nominal one but was a full and adequate consideration, and was all that said premises were worth. Allege that the quit claim deed to Kuhn, dated November 6, 1880, was made for a full valuable consideration to said Martha S. Kinney there then paid the sum of $20,000 paid at the time of the conveyance.

Admit allegations in bill as to trust deed made September 29, 1871, and admits notes secured thereby were pledged to secure indebtedness, as set out in said bill that Bauer filed his bill to foreclose the said trust deeds as alleged, and other persons filed their cross bills as alleged; that a final decree was rendered in that cause April 25, 1878, as alleged; that such proceedings were

afterwards had in the Appellate Court First District as in bill set out; that the premises were sold by the Master to Jacob Rosenberg, vice-president of the bank, in trust for the parties as alleged in the bill. That Loewenthal was appointed receiver as charged in the bill, but that his appointment was limited to the time when a deed should be obtained by the purchaser at the foreclosure sale, and that he never acted or did anything in the premises, or took possession of the premises as receiver, or received any rents out of said premises. Admit that on 16th of February, 1880, an agreement was entered into between Loewenthal, Kinney & Rosenberg, Trustees, for the leasing of said lands and premises, but deny that Loewenthal executed a lease as receiver, but allege he did it as owner or part owner of said premises. Deny that since deed by Master to Rosenberg, September 27, 1879, Loewenthal has exercised any control over said premises, as receiver, or done anything in that character relating to said premises. Admit deed to Rosenfeld by the Master was made and is held for the use of the bank, Bauer, Schoelkopf & Loewenthal. Deny all knowledge of letter of January 14, 1880, addressed by W. T. Burgess, solicitor for Jenkins, to Rosenthal & Pence, and deny that it is any notice to them of anything.

Admit that Loewenthal acting for himself, Bauer, the Bank, and Schoelkopf, in November, 1880, went to Cincinnati and "purchased said premises of the said Martha L. Kinney," and paid her therefor $20,000, and took a deed from her and her husband to Kuhn, which was duly made at the direction of Lowenthal, he paying the consideration for himself and the others above-named, and at the same time Kinney gave a release of all errors in said suit above referred to. That Kuhn made a deed

of release to Loewenthal, as charged; that no consideration was paid except the $20,000 paid by Loewenthal. "Admit that Kuhn never had or claimed to have, or own said notes referred to in said bill as being held by said Kinney," and they deny that Eli Kinney at no time had any other title to said lands than as security for the payment of said notes referred to in said bill or any notes whatever. Deny that they knew said Kinney held said premises as security simply, and not absolutely, as the same appear of record, and deny that they had any notice that should have put them on inquiry as to the matter. Do not know what notes Badger may hold or what have been assigned to him by Kinney; deny that any notes transferred to him were secured by the said lands and premises. Deny that Loewenthal made or filed proof of debt against estate of S. J. Walker in bankruptcy, or that such proof, if made, was any notice to them of complainant's claims. Deny that he is entitled to said lands as part of said estate, and concludes with the general denial.

Cross-bill of Lowenthal, International Bank, Bauer and Schoelkopf, filed June 23, 1881.

As this cross-bill was, on motion of complainants, therein dismissed, it is not deemed material to abstract it or the proceedings upon it.

Order of July 19, 1881, giving leave to file a supplemental bill.

Supplemental bill filed July 19, 1881, by leave of Court.

Sets out the filing of original bill, the parties to it and the prayer, and that the defendants had answered, and that the cause was pending and undetermined.

And by way of supplement, that since the filing of

said original bill, to-wit: on the 14th of June, 1881, during the March Term of said Appellate Court, 1881, such proceedings were had upon said writ of error, that the said decree in favor of said Bank, Bauer, Leowenthal, Schoelkopf was wholly reversed, and the said cause remanded to said Circuit Court for further procedings therein according to law, the copy of order of reversal, and remanding filed in this Court on the 27th of June, A. D. 1881, by complainant, of which said Bauer *et al* had been duly notified ten day and upwards before filing this bill. That on the 28th of June, A. D. 1881, he filed in that cause a supplemental bill of complaint, setting up and charging, among other things, the same facts, matters and things touching the said land and premises that are set up and charged in the bill filed in this cause and praying for the same relief that is prayed for in this bill, and making same persons with others, parties defendant to that bill that are parties defendant to the said original bill in this cause. That he is advised and submits that this cause should be consolidated with or heard at the same time that the said cause in which said decree was rendered shall be heard.

Prayer—answer without oath—That the defendants be decreed to hold said lands and premises, subject to the order of this Court in said cause upon the bill by said Bauer and proceedings therein, and that this cause be considered or heard at the same time as the said cause, for general relief and an order on the defendants in original bill to answer supplemental bill.

Summons on cross-bill issued Aug. 11, 1881.

Order, Oct. 14, 1881, to answer supplemental bill.

Demurrers to cross-bill, filed Oct. 28, 1881.

Answer of all the defendants therein to the bill and supplemental bill, filed Oct. 29, 1881.

Admit that the decree referred to in said supplement has been reversed and mandate filed in this Court.

Admit complainant filed a supplemental bill in *Bauer* v. *Walker et al* as alleged, but allege it was filed without leave, and the Court refused leave to file it on application therefor. Deny that same matters, facts and things are set out in it as are set out in bill and supplemental bill in this cause, and allege it was filed after the defendants had appealed in this cause. Deny that this suit should be consolidated with that, and allege the issues are entirely different in this cause from that.

They adopt the answer heretofore filed in this cause by Berthold Loewenthal and others to the original bill in this cause, and all the allegations therein the same as if they were here again specially repeated, and they rely upon the same. Allege the issuing of a tax deed of said lots 21 to 36 inclusive in block 10, on the 22d of March 1876, to Jacob Rosenberg, on a sale of said lots on the 3rd of November 1873, for non-payment of taxes, and recorded March 25, 1876, and by quit-claim deed dated April 15, 1876, Rosenberg and wife, for a valuable consideration, conveyed said lots to the Bank, recorded Jan. 31, 1877. That since the execution of said deed the Bank has claimed an adverse interest in fee simple in and to said land by virtue of said deed of conveyance to it by said Rosenberg, and that complainant did not bring his suit within two years from the time when his said pretended cause of action accrued to or for him as such assignee. That title, claim or interest acquired by the Bank to said land under said deed to it has been held by it in trust for itself and Loewenthal, Bauer and

Schoelkopf; and they claim an adverse interest in and to said lands under said deed to the Bank, and insist upon the facts above set up by way of plea, and rely upon the Statutes of the United States as a bar to this suit and complete defence thereto. That said pretended cause of action accrued to said complainant on July 31, 1878, and that he then had notice of the said deed to said Bank, and of the claim of said Bank, and these defendants thereto as above set out. That defendants Gray, Sheppard and Sands are tenants under Bank, Loewenthal, Schoelkopf and Bauer, and adopt all the allegations herein and ask the same protection as those under whom they claim.

Petition of complainant, Jenkins, filed Nov. 1, 1881.

Sets out that there are pending in the Circuit Court certain suits, viz.: No. 12,962, Bauer, complainant, and the petitioner, the Bank, Schoelkopf and others, are defendants; No. 15,197, wherein the Bank is complainant, and the petitioner, Schoelkopf, Bauer, Loewenthal, are defendants; No. 15,551, wherein Fleishman is complainant, and petitioner, the Bank and others, are defendants. That in each of said cases the Bank has filed a cross bill and set out that S. J. Walker is indebted to it upon certain notes, twenty-two in number, giving a list of them. That the Bank claims under the "blanket agreement" of July 7, 1869, (setting it out) any surplus of collaterals after satisfying special pledges. That Walker filed in each of said cases an answer denying indebtedness, and setting up usury. That under the pleadings the main issue in each of the cases is what, if anything is due from Walker to the Bank upon an account being taken of their dealings and transactions, parts of which dealings and transactions, and involved

in the taking of the account touching such dealings and transactions are the principal notes in question in each of the cases above referred to, the securities for which are thereby sought to be foreclosed. That such account should be taken but once, and in one suit, and all parties interested therein should be present at the taking thereof.

The petition sets out the condition of the cases referred to, and prays that such order be had and taken; that the account between Walker and the Bank be had and taken in Cause No. 12,962, Bauer vs. Petitioner and others, and the other causes be consolidated with it, or heard with it, so far as the issues in the respective causes are affected by the taking of such account.

Replication to answer to Bill, filed Nov. 2, 1881.

Demurrer to Cross Bill by Jenkins, filed Nov. 12, 1881.

Demurrer to same by Badger, filed same day.

Demurrer to same by Burgess, filed same day.

Demurrer to same by Barker, filed same day.

Order of Nov. 17, 1881, setting cause for trial.

Order of Dec. 8, 1881. Court on argument of Demurrers to cross bill finds the same multifarious, and thereupon the complainant moves for leave to amend the cross bill, and the defendants to dismiss the same; the Court grants leave to amend and overrules the motion to dismiss.

Amendments to Cross Bill, filed Dec. 9, 1881.

Order of Dec. 10, 1881, to answer Cross Bill as amended.

Demurer of Jenkins to Cross Bill, filed December 24, 1881.

Answer and Disclaimer of A. C. Badger to Cross Bill, filed December 28, 1881.

Sets out that it is true that certain notes were made by S. J. Walker to or held by the firm of E. Kinney & Co., and that they were secured by the two deeds from said Walker set out in said cross bill, which otherwise had no consideration, and that after all the conveyances from said Kinney and others set out in said cross bill were made, this defendant purchased said notes from said Eli Kinney as then being unsecured paper, and he as the successor of said firm, having always owned said notes, and this defendant since such purchase, now owns and holds the same, and that he (this defendant) does not now, and never has pretended to have any interest in the said lands under said Eli Kinney by the transfer of said notes, and he disclaims all such interest.

Order January 9, 1882. Leave to compl't to amend bill.

Amendments to bill, filed Jan'y 9, 1882.

That defendants pretend that on 22d March, 1876, a tax deed was issued to Jacob Rosenberg for Lots 21 to 36, inclusive, in said Block 10, for a sale for non-payment of taxes made on the 3d day of November, A. D. 1873, and was recorded the 25th March, 1876, that the 15th April, 1876, Rosenberg and wife, for a valuable consideration, conveyed said lots of land to the International Bank by deed dated that day, and recorded Jan'y 31, 1877, which pretences he charges to be untrue and unfounded in fact. But even if such deeds were made that the trust deed made by said Walker and wife to Rogers, as Trustee, dated Jan'y 29, 1871, to secure the payment of certain notes made by Walker to foreclose which trust deed the said bill of complaint was filed by Bauer as above charged, contains a power authorizing and empowering the hold-

ers of said notes to pay off any taxes or assessments that may be levied on said lands; that at the dates and times set up in said pretences the bill of complaint in the case of Bauer vs. Walker was pending in this Court to foreclose said trust deed; that under it they, the defendants, were authorized and empowered to pay off and discharge said tax, buy in said tax deed, and make the sums of money paid therefor a lien on the said premises; that the tax certificate on which said tax deed was issued was acquired and taken by said Rosenberg, he being vice-president of said bank, for the benefit of said bank, and the holders of the notes secured by said trust deed; that the money paid for it was the money of the bank, and the money paid for said quit claim deed, if any at all paid, which he denies was the money of the bank and of the holders of said notes, and advanced or refunded by them; that the quit claim was without any consideration, and merely to vest in the bank the interest acquired upon the face of the tax deed to the land described in it for the use of the parties holding said notes; that he has the right to refund, and offers to allow in the account in the cause, or as the Court shall direct, all moneys advanced for the purpose of relieving said lands from tax liens, sales or deeds, for which he should properly be charged in the account, and otherwise do equity in the premises.

That 26th March, 1879, the bank filed its petition, of which a copy is filed with and made part of the bill; that neither therein nor at any time since until after this bill was filed was the said tax deed, or any claim, right, or estate under it, mentioned or set up; that the possession of said Loewenthal as Receiver, was the possession of all parties to the suit, complainant included,

and he, the Receiver; so being in possession under the order of the Court for the benefit of the parties, it would be inequitable and unjust to allow any adverse claim as against the complainant to grow out of said tax deed in favor of said bank; that the said tax sale and deed were, and each of them was levied, made and issued in violation of law, and the statutes in such case made and provided, and the said deed is a nullity, and conveys no title to any part of said land to any one; that ever since said tax deed was issued the said suits have been prosecuted with reasonable diligence by said Walker and by said assignee, as well as in proceeding to set aside said tax deed as soon as rights were claimed under it.

Prayer, That the said tax deed be declared a nullity without warrant or authority of law, and the quit claim deed from Rosenberg to the bank set aside, or decreed to have been acquired for the benefit of the parties entitled to redeem from said trust deed to Rogers, and the bank required to release any apparent title acquired thereby, and enjoined from setting up any title thereunder.

Copy of Petition for appointment of Receiver, filed in the Bauer case, March 26,, 1870, hereinafter set out.

Answer of Bank, Bauer, Loewenthal, Schoelkopf to amendments to bill, filed Feb. 3, 1882.

Admit execution of tax deed to Rosenberg as alleged, and the conveyance by Rosenberg to Bank.

Admit interest acquired by Bank under tax deed was for use of Bank, Loewenthal, Bauer and Schoelkopf.

Alleged deed to Bank from Rosenberg was for a valuable consideration paid therefor. That they have claimed an adverse title to said premises ever since the execution of said quit claim deed to Bank by Rosen-

berg, and that if any cause of action accrued to the assignee to set the same and tax deed aside, it accrued more than two years prior to the filing of said bill, and they rely upon the statutes of the United States in such case made and provided as a bar to said pretended cause of action the same as if here specially pleaded.

And general denial, etc:

Answer of Rosenberg, Gray, Sheppard and Sands to bill and supplemental bill, filed Feb. 3, 1882.

Adopts the answer of the Bank, and sets up lease to them from Rosenberg.

Replication to answers to cross bill, filed March 1, 1882.

Final Decree in this cause, entered June, 1882.

ROBERT E. JENKINS, Assignee in bankruptcy of SAMUEL J. WALKER, a Bankrupt,
38223—2353 vs.
BERTHOLD LOEWENTHAL, THE INTERNATIONAL BANK OF CHICAGO, C. EDWARD SCHOELLKOPF, AUGUSTUS BAUER, JACOB ROSENBERG, AMOS R. GRAY, THOMAS H. SHEPPARD, AND LOUIS SANDS. } *Bill and Sup. Bill and Amended Bill.*

And

BERTHOLD LOEWENTHAL, THE INTERNATIONAL BANK OF CHICAGO, AUGUSTUS BAUER and C. EDWARD SCHOELLKOPF
vs.
ROBERT E. JENKINS, Assignee in bankruptcy of SAMUEL J. WALKER, a Bankrupt, ALPHEUS C. BADGER, JACOB ROSENBERG, AMOS R. GRAY, THOMAS H. SHEPPARD and LOUIS SANDS. } *Cross-Bill.*

And now this day comes on said cause to be heard

upon the bill and supplemental bill of complaint filed herein and the amendments thereto, and upon the answers thereto by all of said defendants and upon replication to said answers; also upon the cross-bill of complaint filed herein and the amendments thereto, and upon answer thereto by the said Robert E. Jenkins, assignee in bankruptcy of Samuel J. Walker, a bankrupt, and upon the answer and disclaimer of Alpheus C. Badger, and upon the answers thereto of said Jacob Rosenberg, Amos R. Gray, Thomas H. Sheppard and Louis Sands, and upon replication to all said answers, and upon depositions read, and upon oral evidence heard in open court and upon exhibits and documentary evidence offered and read, and it appearing to the Court therefrom, the Court now finds:

That said Samuel J. Walker being seized in fee of his own right of lots 21 to 34, inclusive, in Block 10 in Samuel J. Walker's Dock Addition to Chicago, did on or about the 9th day of January, 1873, for a valuable consideration, sell and convey said lots above described to one Eli Kinney by deed of conveyance absolute upon its face, and that his wife, Amanda M. Walker united with him in said deed of conveyance and released all her rights, title and interest therein, which said deed was duly executed, acknowledged and delivered by said Samuel J. Walker and wife, and was filed for record in the Recorder's office of Cook county, Illinois, on January 21st, 1873, and was recorded in Book 221 of Records, at page 176.

That said Samuel J. Walker was also heretofore seized in fee of Lots 35, 36, and the south half of Lot 37 in Block 10, in S. J. Walker's Dock Addition to Chicago, and being so seized, he did on or about the 9th day of

January, 1874, for a valuable consideration sell and convey to said Eli Kinney the premises last above described by deed of conveyance absolute in form, which said deed of conveyance was united in by his wife, said Amanda M. Walker, and was duly executed, acknowledged and delivered by both said Walker and wife, and was filed for record in the Recorder's Office of Cook County, Illinois, on the 19th day of February, 1874, and recorded therein in book 332 of records, at page 419. It is claimed by said assignee that said two conveyances though absolute in form were intended as mortgage security; as to which the Court makes no finding.

That all the above described premises being so vested in said Eli Kinney of record, he did afterwards, by deed of conveyance bearing date March 7th, 1878, for a valuable consideration then and there convey all of said premises unto one Charles L. Burgoyne, which said deed was duly executed, acknowledged and delivered and was filed for record in the Recorder's office of Cook County, Illinois, on November 9th, 1880.

That the said Charles L. Burgoyne being so seized in fee of said premises of record did, by deed bearing date March 7th, 1878, execute and deliver a deed of conveyance of said premises for a valuable consideration unto Martha S. Kinney, wife of said Eli Kinney, which said deed was duly executed, acknowledged and delivered to her by said Burgoyne, and was filed for record in said Recorder's office of Cook County, Illinois, on November 9th, 1880.

That said Martha S. Kinney, wife of said Eli Kinney, being so vested with the title of said premises of record, did with her husband, Eli Kinney, execute and deliver

a deed of conveyance bearing date November 16th, 1880, unto one Louis Kuhn of all the premises above described, which said deed of conveyance was for a valuable consideration, and was duly executed, acknowledged and delivered, and was filed for record in said Recorder's office of Cook County, Illinois, on November 17th, 1880.

That said Louis Kuhn being so seized in the fee of said premises by the record, did afterwards for a valuable consideration, by deed bearing date November 16th, 1880, convey all of said premises unto said Berthold Loewenthal, which said deed of conveyance was duly executed, acknowledged and delivered, and was filed for record in said Recorder's office of Cook County, Illinois, on November 23rd, 1880.

That the title so conveyed to said Loewenthal was vested in him in trust for himself, and the said International Bank of Chicago, C. Edward Schoellkopf and Augustus Bauer.

That said Berthold Loewenthal, the International Bank of Chicago, C. Edward Schoellkopf and Augustus Bauer, purchased the title to said premises and paid a valuable consideration therefor, without any knowledge or notice, actual or constructive, of any claim on the part of said Robert E. Jenkins, assignee in bankruptcy of said Samuel J. Walker, or on the part of said Samuel J. Walker, of any interest, of any description in or to any of said premises, and that neither said Loewenthal, the said International Bank, C. Edward Schoellkopf nor Augustus Bauer, at the time of the conveyance of the said premises to said Loewenthal, or at the time of the payment of the consideration by him for said premises to said Kuhn or to said Martha S. Kinney, had any

notice or knowledge of any right, title, claim, interest or demand of any kind on the part of said Jenkins, as assignee as aforesaid, or on the part of said Samuel J. Walker or Amanda M. Walker, his wife, in or to any portion of said premises, and the Court finds that they are innocent purchasers of the same for value.

And the Court further finds that the said bill so filed by said Robert E. Jenkins, assignee as aforesaid, was not filed, nor was said suit commenced within two years from the time when the said alleged cause of action accrued to or for said assignee, against the said Eli Kinney and those claiming under him, and that said assignee knew and was put upon inquiry of the adverse claim of said Kinney to said premises more than two years prior to the commencement of this suit, and that said assignee has been guilty of negligence in bringing said suit, and that he is now barred of any suit or action against the defendants to said original bill, or any of them, under and by virtue of the statute of the United States in such case made and provided.

That said Samuel J. Walker was adjudicated a bankrupt as set out in the said original bill of complaint, and that a deed of assignment was made, executed and delivered on July 31st, 1878, unto said Robert E. Jenkins, as assignee in bankruptcy of said Samuel J. Walker, of all of said Walker's assets of every description as provided by the bankrupt law of the United States then existing.

That such assignee has not offered to do equity or to pay to said Loewenthal or to said International Bank, Schoellkopf or Bauer any part of the indebtedness of said Walker to said Eli Kinney, for which he claimed in his said bill that said premises were conveyed to said Kinney as security.

That since the conveyance of said premises to Martha S. Kinney, and since the conveyance of said premises to said Loewenthal as aforesaid, and since the payment of the consideration therefor he, the said Kinney, has transferred certain evidences of indebtedness executed by said Samuel J. Walker unto said defendant Alpheus C. Badger, which indebtedness said assignee claims was secured by said deeds of conveyance from said Walker to said Kinney.

That said Badger claims to be the owner of the notes so transferred to him, but disclaims any interest in said premises as security for such indebtedness.

That the Court has jurisdiction of all the parties hereto and of the subject matter hereof; and after hear ing argument of Rosenthal & Pence and of W. T. Burgess, counsel for the respective parties, and being now fully advised in the premises, upon motion, it is ordered, adjudged and decreed by the Court that the said bill and supplemental bill of complaint and amendments thereto so filed by said Robert E. Jenkins, assignee as aforesaid, be and the same is hereby dismissed for want of equity; and it is further ordered, adjudged and decreed that the said cross-bill so filed by said Berthold Loewenthal, the International Bank of Chicago, C. Edward Schoellkopf and Augustus Bauer and amendments thereto, be and the same is hereby dismissed without prejudice.

Appeal by complainant to Supreme Court, bond $300 in 30 days.

Certificate of evidence, filed June 22, 1882.

Complainant's testimony. Deposition of William R. Lowe, taken 17th March, 1882:

My name is William R. Lowe; I am 39 years old;

my residence at the present time is near Pittsburg, Pennsylvania; I am a clerk in the Engineer Corps of the United States Navy, at present known on the rolls that way. I have lived in Cincinnati. I was at one time a partner in the firm of E. Kinney & Co., engaged in the banking business in Cincinnati. I do not remember the date I entered the firm as partner; I think it was in 1871 or 1872, and I was a member at the time of its failure, which occurred in 1871, I believe. While I was a member of the firm, Eli Kinney was the principal member of it. Philander E. Kinney, his brother, was at one time a member of it. John Kinney, his son, F. I. Hurlburt and myself also members. I know Samuel J. Walker. I know of his having dealings with the firm. We were in the habit, all the time that I was a member of the firm, of discounting his paper quite extensively. I know that Mr. Kinney, on one of his visits to Chicago to see Walker in regard to getting security for the loans we were making for him, came back and reported that he had secured as security for these debts a block of property in Chicago, spoken of as Block 10. I don't know much about it, except it was always called Block 10, of course. The deed, I believe, for the property was received and held by the Bank as security for whatever Mr. Walker owed us. The character of the deed I don't remember; I don't think I ever read the deed through; simply was advised that the deed was received. At that time I was engaged in the clerical work of the bank, being the junior member of the firm. I was for a long time book-keeper; had charge of the general books, and afterwards acted as teller, and being of little experience I was not always let into details of that kind of business. I trusted to Kinney's judgment.

I was told of these things, but I had not the time to investigate them for myself. Probably they did not think it necessary, as I had little experience at that time in business of that kind, to advise with me very extensively about it. I always understood the deed was held as security for the loans we were making for Mr. Walker. Those loans were evidenced by notes generally, drafts and checks. I know Mrs. Kinney, the wife of Eli Kinney. I married their daughter. Mrs. Kinney was not interested in any way in the affairs of Eli Kinney & Co. to my knowledge, except as her husband was interested. The firm was not indebted to her. As to what Mr. Kinney owed her I don't know anything. I might add that when the firm failed Mrs. Kinney made no claim, I believe, against Mr. Kinney at the time of his failure, except the right of dower. I remember Mrs. Kinney told me she had received at one time some bonds or something from her father, which she gave Mr. Kinney, but I don't think she put in any claim against his individual estate at all at the time of the failure. But it was a small amount, $3,000 or $4,000, something of that kind. I very often talked with Mrs. Kinney about the affairs of the bank, and particularly about the loan we made Mr. Walker, and in that conversation I often referred her to the property in Chicago that Mr. Walker had given us as security; and when Mr. Walker's papers went to protest, and we found we were not getting paid, I often expressed the belief that if we could get possession of Block 10 it would make the bank whole as far as Mr. Walker's indebtedness with us was concerned, and it generally ended in her saying she didn't understand much of those things and could hardly understand this; it was a matter she always trusted to

her husband. She was anxious to inquire about it—about the impending ruin coming, and as Mr. Kinney was reticent about those things, she used to question me, and I talked freely with her and told her all I knew about it.

Cross-Examination: I don't recollect any conveyance from Mr. Walker to Kinney & Co. excepting that of Block 10. I know there was some other transaction for property in Chicago, but Mr. Kinney was dealing with Mr. Walker individually, and they may have referred to his individual business. I know of no other excepting that in regard to the bank I talked with Walker about Block 10; he spoke of it as being ample security from any loss, spoke of the mortgage or whatever it might be that was on the property. I talked with Walker myself about it when he was visiting in Cincinnati, after the transfer had been made to us.

Re-direct: Mrs. Kinney intrusted her business affairs entirely to Mr. Kinney.

Re-cross: The only claim that I ever knew of Mrs. Kinney making against E. Kinney, after the failure was in lieu of her dower. The firm of E. Kinney & Co transferred to Mrs. Kinney, with the consent of the trustees of E. Kinney & Co., Lot 10 in Chicago, which she took as her dower, releasing, I believe, all of the other property that Mr. Kinney had from her dower; that was all she claimed, as I remember; that relinquishment of her dower was to the property which was surrendered by Kinney for the benefit of the firm creditors. The exact amount and value of it I cannot tell. Some property in Portsmouth, Ohio, and in Kentucky, and in Cincinnati, all his property.

Objected to, as the relinquishment must be in writing,

and it is insisted the proof should be made by the instrument.

The Homestead in Cincinnati was under a mortgage, in which she joined, and has since been sold under that mortgage. There were but two of us besides Eli Kinney, Wm. Hurlbut and myself, and we joined in the transfer of this property. We treated this property at the time we transferred it to Mrs. Kinney, as property belonging to the firm, and which they had a right to transfer, because Mr. Walker had not paid his debts. The debts had not been paid, and we held the property until the debts were paid, and we transferred all our right and interest in it to Mrs. Kinney.

Q. You considered that you had a right to transfer that property, did you not, or you would not have done so? Objected to. A. Yes, sir.

Eli Kinney, deposition taken by Jenkins, 11 Feb'y, 1882.

I live at Highland, Kentucky, formerly at Cincinnati, Ohio, was there engaged in banking, name of firm E. Kinney & Co., composed latterly of Frank W. Hurlbut, Wm. R. Lowe and myself; I knew S. J. Walker. The firm did business with him. I know of two deeds made by S. J. Walker to me, one dated Jan'y 9th, 1874, for lots 21 to 34 inclusive, in block 10, of S. J. Walker's Dock addition to Chicago, and the other dated 9th Jan'y, 1874, for lots 35 and 36, and S. ½ of 37, in said block 10.

The first deed was given to me to secure the notes of S. J. Walker, to a great deal larger amount than that property. They were payable either to E. Kinney, or E. Kinney & Co. I do not know what has become of the deed. The property was given to me to secure loans

I had made him, for the firm of E. Kinney & Co. In January 1874, I received another for property, more lots in same block; the purpose and object of that deed was the same as the other.

I did not pay any money for either of those deeds. The debt for which these deeds were taken as security were, I think, generally notes of $10,000, I do not recollect how many of them. It was a great deal over $100,000; over ten of them.

I acted as the agent for my wife, in the transaction in which the title to those lots was put in the hands of Charles L. Burgoyne. She had personally nothing to do with it.

Cross examination. I recollect of putting a mortgage on the property conveyed, by the two deeds referred to, to Dunham & Kyle for $25,000. I think it was to them, not certain. They were trustees of my estate in my bankruptcy proceedings. I think this mortgage was an indemnity for to secure some condition. I do not recollect what. It never amounted to anything. I can't think it was for the purpose of securing a settlement with my firm creditors; it was never considered by me or them to amount to anything. Have no recollection that they afterwards re-conveyed or released that instrument to me. I suppose that afterwards a deed of conveyance was made to Burgoyne, who at same time made a deed of same property to my wife. I can't tell why that deed was made to her. I suppose on account of insolvency or something; I think she executed a release of her dower rights in my property, but I have really forgotten it. I do not recollect anything of the fact that my wife surrendered certain rights against my partnership estate in consideration that this property should

be conveyed to her or any consideration. I do not recollect that she and my family had a claim against E. Kinney & Co. There was no consideration immediately from the firm; may be there was some claim against the firm of E. Kinney & Co. I owed the family $2,000 or $3,000, may be more, may be $5,000. When Loewenthal purchased these premises, the money was paid to her and I received the money. I deposited it with S. Kuhn & Co., bankers. I done it myself I think in her name, but my recollection is so uncertain, my memory has failed me somewhat lately. I am getting somewhat up in years. I am over 67 years of age. My health has been delicate somewhat this past summer. I have been troubled with nervousness for some time, nervousness of one arm, from shooting too heavy loads at ducks, loading my gun too heavy. I do not think I can recollect my business transactions, as well as I could six or seven years ago, still I retain my faculties. I recollect these deeds from Walker, were in the form of deeds in consequence of a prior mortgage upon it for $20,000 or $30,000, which he agreed to take off. Well, he gave the deed to me for a consideration, I expected to own it, it was taken really to secure debts that he owed.

Q. It was taken absolutely? A. Yes sir, of course taken as a absolute deed.

Q. Was it understood at the time, that you could sell and transfer it? A. Well, I suppose there was no understanding that I could not; if I got more than enough to pay, he was to have it.

Q. It was understood at the time, if you made a sale and got more than the indebtedness due to you, that he was to have the balance? A. Yes, sir.

Q. And if he got less was he to pay you the balance? A. Yes, sir.

Q. What, if anything, as to an absolute deed? A. You might call that an absolute deed.

Q. What was understood between you; that you might sell the property and convey it? A. Certainly.

Q. That was the understanding? A. That I should sell the property and make the most of it to secure myself.

Q. And it was understood between you and Mr. Walker at the time that you might use it just as you desired? A. When it was deeded to me of course it was understood so.

Q. And that you were to account to him if you got more than the indebtedness? A. There was not a thing of that kind; I said if I sold it for more than that to pay the indebtedness I will account to you for it.

Q. What was said about incumbrances on it? A. There was some $30,000 incumbrance.

Q. He agreed to take that off? A. Yes, sir.

Q. Well, he never did? A. Well, I do not recollect; I do not suppose he did, of course.

Q. You have treated this property as your own ever since those deeds were made to you? A. Of course I have.

Q. And claimed it as yours? A. Yes, sir.

Q. And brought suit in Chicago about it as your own? A. Yes, sir.

Q. And made contracts and leases in regard to it? A. Yes, sir; I leased it, or my wife done it, I believe.

Q. Did you make a contract once in reference to this property with Mr. Badger, with reference to conducting a certain law suit? A. Well, I do not recollect.

Q. Do not you recollect of a law suit when Mr. Loewenthal, of the International Bank, foreclosed a mortgage upon it? and do not you recollect of having made some kind of a contract with Mr. Badger about it? A. What do you allude to?

Q. About a contract to prosecute those suits; you recollect of getting a decree against the property in 1878? A. I have forgotten about the transaction, really; there was something of that kind.

Q. You claimed the property as your own? A. Yes, sir.

Q. You claimed it absolutely as against Samuel J. Walker? A. Yes, sir.

Q. You never pretended anything else? A. No, sir.

Q. Neither did Walker; you always claimed to own it? A. Yes, sir.

Q. You made that mortgage to Dunham & Kyle, and you claimed to own it at that time? A. Yes, sir.

Q. Before you go any further, was there a mortgage made to Dunham & Kyle? A. Yes, a bond of $25,000 as indemnity.

Q. You claimed at the time that you made that instrument that it was yours? A. Yes, sir.

Q. And that you had the right to convey it as you chose? A. Yes, sir.

Q. And you claimed it as against Samuel J. Walker as your own? A. Yes, of course, for he had no claim to it.

Q. You thought you had a right to deal with it as you chose? A. Yes, sir.

Q. You always asserted that right? A. Yes, sir. I have forgotten about the suit brought in the United

States Court in Chicago by Judge Dunlevy, but he did a good many things there without authority. There were brick-yards on this property when we bought it, but we never made any new lease for a brick-yard; we got them off as soon as we could,

I think there was something about Hair & Odion piling lumber on these lots. I am not sure; I think I gave them a right for a small consideration, if I recollect right.

I am not sure what became of the notes of Sam. Walker that we held; I think they are in Chicago, in the hands of my attorney there—the $10,000 notes—Mr. Badger transacted that business. I think he has them; I suppose he has as much as anybody else; I gave them to him for collection; he does not own them; he did not own them; I don't think he does.

Re-direct Examination. Q. Did you ever tell Sam'l Walker you owned that property, and he did not? A. No, sir, I think not.

Q. Did not you always say you were holding that property as collateral security. A. Yes, sir.

Q. That is why you claimed to own it, because you held it as security for sums of money advanced? A. Yes, sir.

Q. You never took it for the debt? A. No, sir, the debt is not paid yet.

Q. You held it as security for that debt? A. Yes, sir.

Q. Before you deeded it to Loewenthal? A. Yes, sir, it was a debt to me right at the time, and I supposed I had a right to dispose of it.

Q. You never disposed of this property in payment

of this debt, did you? A. No, sir, I never did—the property had so many incumbrances upon it, the consideration was not considered any good.

Q. You did not consider it much security, there was so many incumbrances? A. Yes, sir; that is what was in my mind.

Q. Did you make a contract in writing with Mr. Badger? A. I think I did.

My health is not very good now; I am very nervous, and hesitated about being examined to-day; I have my doubts about the clearness of my recollection as to my acts in reference to that land; my recollection is that I did take the property merely as collateral security, and I have always been willing to take the debt if paid, and reconvey the property until I disposed of it to Loewenthal.

Re-cross Examination. The title was put in Burgoyne to do it in the legal form; I supposed I had a right to do it.

My wife released her dower in property, which I turned over to the firm creditors.

I owed her something individually—the firm did not.

Deeds from S. J. Walker and wife to the witness, accompanying, and referred to in this deposition as set out at page ~~735~~ 68, etc., of record.

Walker's Schedule in Bankruptcy, set out in p. 36 of Record.

Proof of Debt by B. Loewenthal in the Bankruptcy Proceedings of Samuel J. Walker, made April 3, 1879, in the usual form. It sets out a copy of a bond made by S. J. Walker and Henry H. Walker to Loewenthal, in the penalty of $20,000, dated Feb'y 17, 1873, reciting sale of lands by S. J. Walker to Loewenthal in

Block 13, Dock addition, and his agreement to improve the same, and conditioned to be void if he made the improvement. Avers that he did not make them, and that Loewenthal did and expended certain sums of money, and otherwise was damnified to $20,000; also sets out a note made by S. J. Walker to him, dated July 23, 1873, for $10,000, on which there is a balance of $2,040.38 due him, for which he has no security except the two collateral notes mentioned in it, made by H. H. Walker, which are wholly worthless. That the claims amount to $22,040.38, and is unsecured; is sworn to before the Register in Bankruptcy, who certifies that all the statements in the foregoing depositions appear to be true, and that the proof of claim therein contained against the said Bankrupt is satisfactory to me, * * and that the said amount is entitled to priority of payment under the provisions of Bankrupt law; is endorsed: Filed in my office, April 3, 1879; H. N. Hibbard, Register in Bankruptcy. Indorsed: "Received by R. E. Jenkins, Apr. 9, 1879."

Report of sale in Bauer case, filed June 25, 1878, shows that the Master on 24th June, 1878, sold lots 21 to 36 in Block 10, to Jacob Rosenberg for a cash bid of $54,500.

Does not say that the cash was paid.

Report of Distribution in Bauer case, filed 15th March, 1879.

Part of this report is a letter from Rosenthal & Pence, solicitors, etc., that the bids of Rosenberg are for the parties in interest.

Mandate from the Appellate Court, First District, filed June 22, 1881.

At March T., 1881, on the 14th June 1881, the

decree in the Bauer case reversed and cause remanded for further proceedings.

Procedendo from same court, filed June 22, 1881.

A. C. Badger, in open court:

I was present when the petition for the receiver was presented to the Court, in the case of Bauer v. Walker, by Rosenthal & Pence, before Judge Williams. Daniel K. Tenney was present. He took an active part, opposing the petition, supposing it affected property that he had an interest in. The result was that his property was left out of the receivership.

The original order is shown, in which lots 11 to 18 were stricken out from it, as presented to the Court.

I know Eli Kinney for about 30 years. I was present when the election of Walker's assignee was going on before Hibbard, the Register. Kinney was watching the matter very closely, and I had some conversation with him upon the subject. There was an active contest for the assigneeship, and I was trying to get all the claims proved up I could get control of. I endeavored to get him to prove the claims he had against Walker. He consulted with Judge Dunlevy, and declined to do so. I saw him shortly afterwards about his claim against Walker. He told me the reason why he could not prove them up was because the property he held in block 10 was security, and there never had been a settlement between him and Walker. I think I communicated that intelligence both to Jenkins and to Burgess, probably within 30 days, certainly within 60 days after his appointment as assignee.

11 notes put in evidence, made by Walker to Kinney & Co.

They are for $10,000 each, all dated Jan. 10, 1873—

four at eight months, four at twelve months, and three at fifteen months from date.

Cross-examination.—It was only a short time after Jenkins' appointment that I communicated to him this information that Kinney held this block 10 only as security.

I voted for Jenkins as assignee on all the claims I controlled, and exercised my influence on others to do the same thing. Jenkins was appointed provisional assignee very soon after Walker filed his petition in bankruptcy, about April 26, 1878. Jenkins, as provisional assignee, applied to open the decree in the Bauer case and defend. Burgess drew the bill.

Jenkins, since his appointment as assignee, whenever the occasion came up, has exercised authority. It has been the uniform habit of myself and Burgess, when anything was done, to consult with Jenkins, in order to obtain his authority, and I presume that as far as the writ of error was concerned, (from that decree). We have held a great many conversations about various things, and I presume that was discussed as well as other things.

Admission.—"It is admitted that Jenkins did retain Barker and Burgess to prosecute the writ of error in the Appellate Court, sued out by Walker immediately after his appointment as regular assignee; and that he took charge of the suit so instituted, and it was managed under his direction, and also that he, after his appointment as assignee, immediately took charge of the writ of error sued out in the name of Walker from the Appellate Court, to review decree in the case of the International Bank v. Walker, entered April 25, 1878, and that Jenkins caused writ of error to be sued out of Supreme

Court of the State, to review the judgment of the Appellate Court, and that Burgess and Barker represented him in that writ of error in the Supreme Court."

From deposition of Samuel J. Walker, taken in the case of Bauer v. *Walker and other cases, in the cross-examination by Mr. Pence on the 7th day of September, 1876, reads the following:*

Q. Did you, at some time during the year 1872, convey lots 21 to 36, in block 10, Walker's Dock Addition, to Eli Kinney, of Cincinnati, by warranty deed?

(Objected to as improper cross-examination.)

A. I did.

Q. Were not the premises last described at the time of such conveyance, subject to a trust deed, securing the three $50,000 notes in this suit?

(Objected to.)

A. It was with other property.

Q. Was not such conveyance made to Kinney, free and clear from all encumbrances? A. The deed was so made, they agreeing to allow me a liberal price toward my indebtedness, if I would make the property clear, and there was some sort of a statement given at the time, or shortly after, that as soon as I made it clear, they were to give up certain papers. I further state that I stated to them that this property, instead of being bound for $150,000, that there was an indebtedness on it, claimed by the bank, of $55,000 on this and other property; and I would further state that the bank or Hoffman agreed directly after the panic, or directly after the sale (knowing it, of course, as the sale was published in the papers), to release this property on the payment of $30,000, which would have left me a credit with Kinney & Co., on account of my indebtedness of some

one hundred thousand dollars, or more. And I further state that I conveyed this property to Mr. Kinney for the purpose of securing a settlement, in case I could release it, they, at the time of my conveyance, not paying me any money consideration whatever; the object being to secure a settlement with them, if possible, on the most favorable terms possible.

Q. Did you swear Eli Kinney knew of this trust deed, securing these three $50,000 notes at the time of the conveyance to him? A. My recollection is that I did not mention to Kinney the amount of the trust deed, but merely the amount of the incumbrance that I actually regarded on that, and what it would require to have them released. Mr. Kinney at the time supposing the incumbrance was much less or but a small amount, as compared with $150,000, but for which I had arrangements to release. Our agreement was, as before stated, for $30,000, and which the bank was anxious to have me pay and take the release. The bank at first asked me some $40.000 for the release, but would, if I had done it within some short time, some two or three months, I think, released it on the payment of $30,000.

W. T. Burgess, in open court.

On the 14th Jan'y, 1880, I wrote a note, of which I have a copy in my letter press book, and on the same date served it upon Mr. Pence at his office, (objected to.) Letter read.

Law office of W. T. Burgess, Room 35, No. 97 Clark St., Chicago, Jan'y 14, 1880.

Messrs. ROSENTHAL & PENCE, Solicitors for the International Bank and others.

GENTS—I am told that attempts are being made for compromise between Eli Kinney and the parties whom

you represent of the matters in litigation between them; as Mr. Jenkins, S. J. Walker's assignee in bankruptcy is also interested in these matters, you are hereby notified not to proceed therein without his consent. Yours, &c..

"*W. T. Burgess, Solicitor for Jenkins.*"

Admission. It is admitted that Rosenthal and Pence were solicitors for the International Bank, Bauer and others, in the suits then pending in the Appellate Court, to review the decree in the case of Bauer and Walker and others, and in the suits in the Supreme Court, if there were any then pending.

Witness resuming. I met Mr. Pence in his office at the time I served this notice, and had a few words conversation with him about the suits pending; just what we said at that time, I have forgotten now; then I handed him this note, he took and read it, and made a jocular remark about it, and then we separated.

Cross examination. I have been acting as Jenkins' (assignee) legal adviser from the time of his election as assignee, in reference to what we call these Walker cases. I was not solicitor for Kinney when the decrees were entered; became so soon afterwards. I made as his solicitor an application for leave to defend the Bauer suit after the decree. The record shows it, and the application on his and also on Jenkins' behalf, to set aside the sale.

Re-direct. I want to say something which I forgot when I was testifying When I went to Mr. Pence with this note, I told him I understood there were some measures afoot, looking to the settlement of the suit between Mr. Kinney and the bank, and others, and that I had come to give him notice, and after he had read the notice through, he then made the remark which I called

a jocular remark a moment ago, that there would not be much left for the assignee, or something of that kind.

Supplemental cross bill of Jenkins, filed June 27, 1881, in the case of No. 12,962, Bauer v. Jenkins et al, and amendments to it filed Jan'y 9, 1882

This bill is a substantial copy of the bill filed in this case, except in so far that it includes other lands. The allegations in regard to the conveyances to Loewenthal, under which he claimed to have obtained the title to the land in Block 10, are substantially the same in both cases, and it is not deemed material to abstract them further.

The defendants object—received subject to objection.

DEFENDANTS TESTIMONY.

Bill in Bauer v. Walker. filed Aug. 29, 1874. Objected to, but read.

Sets out the making of the Rogers trust deed on these lots, to secure three $50,000 notes, and its pledge to the bank to secure the six notes held by Bauer, Loewenthal, Schoelkopf and the bank. It charges that on or about Jan'y 9, 1873, Walker and his wife "made, executed and delivered to one Eli Kinney a general warranty deed, conveying to him" lots 21 to 34 and 37, and S ½ of 38 in Block 10, and also on or about the 9th Jan'y, 1874, "made a deed of conveyance unto said Eli Kinney of Lots 35 and 36 in said Block 10," but says nothing whatever as to the consideration for such conveyances. That the following named persons claim to have some interest in the above described premises as purchasers, judgment creditors or otherwise, subsequent to the filing of record of the said respective

trust deeds above set out, but whatever interests they have *are subject and second* to the rights of your orator in the premises, namely, William F. Coolbaugh, * * * * Eli Kinney, and about one hundred other persons. That the interest of the persons thus named, whatever they may be, have occurred subsequently and are subject to the trust deeds set out in the bill. This bill was filed by Bauer to have the benefit of "blanket" agreements made by S. J. Walker with the Bank, dated respectively July 7, 1869, July 9, 1873, and it charges that, not only he but Henry A. Kohn, Leopold Miller, Jacob Leibenstein, Levi Rosenfeld, Jacob Rosenberg, Berthold Loewenthal, and several others, all made parties to the bill, claimed an interest in said collateral notes of $50,000 secured by the Rogers trust deed as collateral to principal notes of Walker to the bank, and by it negotiated to them. "That by virtue of the agreements hereinbefore set out, the 'blanket agreements' between said Samuel J. Walker and said bank, your orator is entitled in case the securities above set out, are not sufficient to pay the indebtedness so due to him to any balance which may be left upon the other securities so deposited with said bank to secure the other indebtedness not herein set out due to said bank from said Walker. That your orator cannot set out or describe such other indebtedness and securities and hence he calls upon said bank to set out in detail all indebtedness due to it or to other persons through it from said Walker and the security therefor." It is prayed "that said bank may make discovery as above asked, and that the usual decree may be made for the sale of said premises and that out of the proceeds arising from such sale that your orator may be paid the amount due him."

Answer of J. F. Walker to that bill, filed April 29, 1875.

Objected to, because signed by the solicitor and not Walker, and generally objected to. Received subject to objections.

Sets up usury, and denies any indebtedness on the principal notes set out.

"This defendant further answering admits the execution by himself and wife of the deeds to said defendant Eli Kinney referred to in said bill, and claims and insists that said conveyances were for good and valuable considerations, and that the title to the premises therein described, passed thereby to said Kinney, and that the same ought in justice and equity to stand discharged of any and all liens thereon by reason of the deed of trust embracing the same, and that the same would so appear if a just and fair accounting and settlement would be had between the said International Bank and this defendant."

The bank came in and filed its cross bill. The cause was heard, as appears by the title of the decree on this cross bill, and a decree rendered on Bauer's bill and the bank's cross bill, on the 25th April, 1878.

This decree finds that Walker and wife made the Rogers trust deed to secure these $50,000 notes, one of which was surrendered. That the amount due on the two notes still held on the Rogers trust deed is $94,177.77 on each, in all $148,355.54, the other $50,000 having been surrendered and new note taken. Finds these two notes and others specifically pledged for the 6 principal notes held by Bauer, Loewenthal, Schoelkopf and the bank; that lots 21 to 36 should be sold to pay them, "and if there be any surplus remaining after the payment of said six notes last men-

tioned, *that said International Bank is entitled to have such surplus, not exceeding the amount due upon said three $50,000 notes, applied to the payment of its general indebtedness upon all the notes held by it against Samuel J. Walker.*" "That said Samuel J. Walker is also indebted unto said International Bank upon various other promissory notes of indebtedness which are not specially secured by any specific pledge of said collateral notes and trust deeds securing the same as hereinbefore set out, but *that said International Bank is entitled under the general collateral agreements* hereinbefore set out, bearing date July 7, 1869, (copied verbatim,) December 30, 1871, (copied verbatim,) and July, 9, 1873, (copied verbatim,) respectively, to have all said trust deeds foreclosed and the premises so conveyed, sold, (except those of Thompson, Williams and Larned,) and to have whatever *surplus* may remain upon said foreclosures after the satisfaction of the specific notes for which they were respectively pledged, not exceeding the amount so found due upon said collateral notes applied upon said general indebtedness *of said Walker unto said International Bank*, which is due unto said bank as hereinbefore and hereinafter stated as follows:" The decree then finds Walker indebted to the bank.

On note	2659,	date	April 4, 1873,.....	$ 6,386.66
"	2822,	"	May 29, 1873,.....	10,022.67
"	2740,	"	Ap'l 29, 1873,.....	6,265.83
"	2741,	"	Ap'l 29, 1873,.....	6,265.83
"		"	Ap'l 15, 1873,.....	59.83
"	3151,	"	Sep. 18, 1873,.....	15,620.83
"	3276,	"	Jan. 17, 1874,.....	12,290.00
On J. D. Kinney's note			June 27, 1873,.....	10,007.37
" "	"	"	June 27, 1873,.....	7,104.16
" note No. 3394,		date	Mar. 17, 1874,.....	8,151.57
Total.....				$82,168.15

These, with other notes, dated prior to the 21 day of January, 1873, are thus summed up: "That the total amount of the indebtedness due unto said International Bank from said Samuel J. Walker on January 15, 1878, the date of said Master's report, after making application of the amounts collected, and with which said bank is chargeable as heretofore found and ordered by the Court, and after deducting the amount of $414.46 unappropriated by said Walker was the sum of $172,474.00."

After directing the sale of the property by the Master, the application of proceeds of the sale is directed, "that if there be any surplus after the satisfaction of the principal notes for which the premises hereinbefore described were specifically pledged, said Master shall pay over unto said Bauer and unto said Miller and Liebenstein, the surplus arising out of the sale of the particular premises to which the court has heretofore found they were entitled, and in the order found and upon the particular principal notes as found, not exceeding, however, the amount remaining due upon such particular notes, viz: the said notes numbered 2422 and 2433 respectively, and not exceeding the amount due upon said collateral notes as heretofore found with interest, out of the security of which they are entitled to participate as heretofore found, *and if there be then any surplus remaining, said Master shall pay over unto the said International Bank such surplus* not exceeding the amount herein found due upon the collateral notes for which said premises were given as security and not exceeding the amount which shall remain due to the bank *upon all the principal notes* of said Samuel J. Walker unto the said International Bank as

hereinbefore set out after the application of the proceeds as heretofore stated. If any surplus shall remain after the application of the proceeds of such sale or sales in the manner hereinbefore stated, the same shall be brought into court by said Master for distribution among the parties entitled thereto according to their respective rights as the same may hereafter be determined."

Petition of Kinney, filed June 21st, 1878. Objected to.

Sets out he was brought into the Bauer case by publication of notice, and prays to be let in to defend under the statute.

Petition of Kinney, filed June 29th, 1878. Objected to; signed by his attorney.

To stay distribution of proceeds of sale under decree of April, 1878.

Petition of Kinney, filed June 22, 1878. Objected to; signed by his attorney.

That the Master under decree of April, 1878, is about to sell Lots 21 to 36, Block 10, Walker's Dock Addition.

That he claims to be and believes he is the owner of said above described real estate, and intends to contest the claims set up thereto by Bauer and others, and believes he has a good defense thereto.

Order June 22, 1878, in Bauer case. Objected to.

Petition to be let in under statute allowed. Petition to stay sale denied.

Answer of Eli Kinney to the original bill in Bauer case, filed July 26, 1878. Objected to, being signed by his attorney.

That on the 9th Jan'y, 1873, by deed of that date,

with full covenant of warranty seizin against incumbrance, the said Samuel J. Walker and his wife, for a valuable consideration to him, then and there paid in full, to-wit: the sum of ——— thousand dollars, did grant, bargain, sell and convey unto this defendant, his heirs and assignees, Lots 21 to 36 inclusive, and 37 and 38 in Block ten (10); that this defendant then entered into possession, and has been since claiming title fee thereto, clear of all liens and incumbrances; which deed was recorded on the —— day of ———. Signed W. T. Burgess, solicitor.

Answer of Kinney to cross-bill of Miller et al. in same case, filed July 26, 1878. Objected to, and as signed by attorney.

Same statement as in the answer to the original bill above set out, signed by W. T. Burgess, as solicitor.

Petition by Kinney for change of venue, filed May, 1879.

Cross-bill of Eli Kinney in Bauer case, filed April 21, 1879. Objected to, signed by his attorney, W. T. Burgess. Jenkins is not made a party to this bill.

That Walker deposited with said bank as collateral to notes made by him, divers notes secured by trust deeds, among which were the notes hereinafter set out, as affecting the real estate belonging to your orator hereafter described.

Sets out the trust deed made by Walker to Rogers on Lots 21 to 36, Block 10, to recover these $50,000 notes.

That on the 26th June, 1878, under the decree of April 25th, 1878, in the Bauer case, the Master sold to Jacob Rosenberg (whom he makes a defendant) the lands and premises claimed by and conveyed to your

orator, namely, lots numbers 21 to 36, inclusive, in block 10, Walker's Dock Addition for $54,500, that he paid no money therefor, but the Master has issued a certificate to him as though he had, whereby his interests may be injured, and he prays an injunction against him from selling the certificate. Signed, Eli Kinney, W. T. Burgess, solicitor.

Motion by Jenkins, filed May 11, 1878. Objected to.

Sets out that he is provisional assignee in Bankruptcy of Samuel J. Walker, and moves the Court to vacate the decree of April 25, 1878, in the Bauer case, it being entered at the term motion made.

Bill filed in U. S. Circuit Court, N. D. of Ill., in Chancery, on the 23d May, 1874, by Eli Kinney. Objected to.

Is against International Bank, B. Loewenthal and S. J. Walker, and avers that on the 9th January, 1873, S. J. Walker, with his wife, made to him a general warranty deed conveying to him lots 21 to 36 and 37, and south half of 38, in block 10, Walker's Dock Addition.

Sets out trust deed to Rogers on the same lots, to secure debts to bank, which he charges are usurious or paid.

Prayer for an account of loans made to Walker, and "that the lots in said block 10, conveyed to your orator as aforesaid, may be adjudged and decreed to be free and clear of all incumbrance and lien by reason of said three notes of $50,000 each, and said trust deed."

Answer of S. J. Walker to bill of Kinney in U. S. Court, filed Jan'y 25, 1875.

"He admits the execution and delivery of the deed by this defendant and his wife, conveying lots numbered from 21 to 36, inclusive, and lot 37, and the south half

of 38 in block No. 10, in S. J. Walker's Dock Addition to Chicago, as stated in said bill."

Admits execution and deposit as security of the three $50,000 notes and trust deed to Rogers, made by him, but denies that he owes the bank anything.

That on taking account he does not owe bank anything.

That, therefore, all his securities ought to be surrendered to him.

Stipulation as to bill, filed by Jenkins, next set out, that so much of it as is set out is what the parties deem material to introduce, and that in setting out answer of Walker to the bill of Bauer, there is no allusion made to the Kinney deed whatever.

Bill filed in U. S. Circuit Court, N D. of Ill., by Jenkins as provisional assignee of S. J. Walker, a bankrupt, June 19, 1878. Objected to.

It is against the International Bank, Loewenthal, Bauer, Schoellkopf and others, and upon "information and belief."

Sets out that Walker filed his petition in bankruptcy, and had attached to his petition the schedules required by law, was adjudicated bankrupt April 26, 1878, and orator had been, by order of Court, duly appointed provisional assignee in bankruptcy of said Walker, with full power to act as such until an assignee should be appointed.

That the Master had advertised for sale on June 28, 1878, under decree in *Bauer* v. *Walker et al.*, of April 25, 1878, among others, lots 21 to 36, in block 10, Walker's Dock Addition.

Sets out the filing of the bill by *Bauer* v. *Walker et al.* on the 29th August, 1874, in Cook Circuit Court,

gives part of the substance of it, the charges touching the three $50,000 notes and Roger's trust deed, and the making of the conveyance to Kinney, and the prayer for a foreclosure, etc.

The bill then sets out that he, on 11th May, 1878, before the close of the term, appeared by his counsel, filed a copy of his appointment as provisional assignee, and moved the Court to vacate the decrees, and the Court refused to do so. That then he moved to be allowed in the name of Walker to pray and take an appeal from said decree, and the Court refused to allow it. S. J. Walker then prayed an appeal, and it was allowed, giving bond in penalty of $100,000. That Walker being unable to perfect appeal, he, Jenkins, sued out writ of error on the 18th June, 1878, from Appellate Court in the name of said Walker, and the same was then pending and undetermined; that, as he is advised, so many errors and irregularities have intervened in said proceedings that said decrees will be reversed, and thereby the estate and effects covered by said decrees released from the liens claimed thereon, or the amount thereof greatly reduced to the great benefit and advantage of the estate of said Walker in bankruptcy.

That the matters involved and in controversy in said suit amount in value to about $1,000,000, and the interest of the bankrupt's estate therein over and above those of other parties interested in some of the property is $500,000; asks the Court to take jurisdiction of the matters and things now pending in the Appellate Court upon writ of error touching the claims and demands of the Bank, Bauer, Schoellkopf and others against said Walker.

Refers for a more particular statement of the various instruments in writing referred to in this bill of complaint to the same, or certified copies thereof when produced.

Prayer for an account and stay of sale under the decree of the property described in it and in the advertisement.

Thaddeus Winters, sworn in open court:

I am in the lumber business; know Eli Kinney; had an interview with him about renting lots 21 to 36, block 10, Walker's Addition, three years ago this spring, in Cincinnati. He claimed he had full power to lease the property; that there was some prior lien to be arranged. He came to Chicago, and I went with him or went myself to Loewenthal and found there was so much complication about it that we finally concluded to give it up. He, Kinney, claimed that he owned the property, (objected to) was anxious to rent, and we concluded on a price.

Cross-Examination. I did not make any contract with him about it.

Christian Hupe, in open court:

I occupied part of block 10, Walker's Dock Addition; I made brick there; (is shown lease and says) that is my name, signature there; that is Kinney's; that is my partner's.

Lease offered, objected and received.

It is dated Feb'y 1, 1877, between Eli Kinney by John C. Dunlevy, his attorney, to Christian Hooper and Frederick Kritenstein. Leases lots 31, 32, 33 and 34, in block 10, Walker's Dock Addition, from April 1, 1877, to April 1, 1879; rent, $500, of which $250 paid then, and $250 April 1, 1878; said 400 feet dock front hereby leased to be used as a brick yard, and said par-

ties are to have all the clay and dirt to be taken by dredging or otherwise out of part of the river front on said block 10 to the depth of at least 13 feet, and so soon as said river front is dredged to said depth, then to begin at the south end of said slip, on the west side, and take the clay out clean as they go north to the depth of 13 feet.

Endorsed: It is extended for one year to March 31, 1880, at a rent of $300, stated to be then paid.

Witness—I went into possession of these premises under this lease.

Kinney signed extension, and I paid him for it. Kinney came there often afterwards and said it was his own ground; told me not to pay rent to Dunlevy—to pay it to him; I paid him, Kinney, $100 of the $500, and the last $300.

Loewenthal, in the fall, gave me notice that I should pay no rent; I told him the rent had been paid in advance; then it was coming in court, you know; then in the winter I didn't see Kinney, so he did not come to town then, and in the spring I went to Loewenthal and asked him how that was with that ground up there. Well, he says, "you can never make any more brick there," he says, because that ground is rented, we are going to take it ourselves; I guess that was in 1880; I remained till March, 1880.

Subpœna in Kinney vs. *Bank et al. in U. S. Court, issued on filing bill* May 23, 1874. Objected to.

Return served on Bank, Loewenthal and Walker.

Order of U. S. Court in that case, dated July 6, 1880. Suit dismissed for want of prosecution.

Order in Jenkins' Provisional Assignee vs. *Bank and others, of June 25, 1878*, denying motion for injunction.

Demurrer in same cause.

Notice in same cause for leave to file supplemental bill making Jenkins, assignee, party complainant.

Order in same cause, containing motion for such leave.

Motion in same cause for such leave.

Order in same cause of May 27, 1879.

Defendants move to dismiss the bill. Court denies motion for leave to amend bill by making S. J. Walker complainant in place of Jenkins, and sustains motion to dismiss bill. Bill dismissed.

Final decree in Bauer case, entered April 25, 1878. Objected to. See Page 49 ante

Confirmatory decree entered in same cause, Nov. 25, 1880. Objected to.

Bauer files procedendo of Appellate Court, and waived the notice required by statute, and on his motion cause re-docketed. Kinney appears by his solicitor, John P. Ahrens, and consents that the decree of April 25, 1878, entered herein, may be confirmed, and the cross bill filed by him may be dismissed. The Court, therefore, orders decree confirmed and cross bill dismissed.

Transcript of Record from Appellate Court in Jenkins & Bauer et al. Objected to. It sets forth:

Stipulation, filed Nov. 22, 1880, signed by E. Kinney, waives errors in Record and proceedings in said cause, and consents that a decree may be entered by Appellate Court affirming the decree against him in said cause, and authorizes John P. Ahrens to appear for him therein.

Order of Appellate Court made Nov. 22, 1880.

Recites that Kinney, one of defendants, waived all errors, and having consented that the decree of the Circuit be affirmed as to him. Ordered, therefore, that the decree be affirmed as to him.

Admission. It is admitted by the respective counsel hereto that the writ of error was originally sued out on the 18th June, A. D. 1878, in name of S. J. Walker, and afterwards, on 9th December, 1879, Jenkins, assignee, etc., asked leave to be substituted in place of Walker, and a motion at the time was made by defendants in error to dismiss writ; and on 14th December, 1879, motion to dismiss was denied, and Jenkins, assignee, substituted.

Deed. S. J. Walker and wife to Eli Kinney.

Dated Jan'y 9, 1873; consideration, $155,100; grants bargains, sells Lots 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34, in Block 10, S. J. Walker's Dock Addition to Chicago. Covenants of seizin right to convey, free and clear of incumbrances and of warranty. Recorded Jan'y 21, 1873.

Deed. S. J. Walker and wife to Eli Kinney.

Dated Jan'y 9, 1874; consideration, $31,250; conveys Lots 35, 36, and S. ½ of 37 in same block, with same covenants. Recorded 19th Febuary, 1874.

Mortgage. E. Kinney to Kyle & Dunham. Objected to.

E. Kinney, in consideration of $25,000, to him paid by Kyle & Dunham, trustees for the creditors of E. Kinney & Co., doth grant, bargain, sell and convey to them and their successors in the trust, Lots 21 to 36, and S. ½ of 37 in Block 10, Walker's Dock Addition. Kinney covenants that he is the true and lawful owner of the said premises, and has full power to convey the same: *Provided, nevertheless*, that whereas Kinney has effected a composition with the creditors of the late firm of E. Kinney & Co., which said composition has been adjudicated by the U. S. Court in Bankruptcy, in and for the S. D. of Ohio, to be a valid and binding com-

position under the Bankruptcy law; and it is by the terms of said composition, stipulated by said firm creditors, that in consideration of Kinney conveying by deed of trust to said trustees the property therein described and not including the real estate herein described, that said creditors would release forever all claim in and right to said herein described property, or right to sequestrate the same to the payment of their claims, saving only that inasmuch as the property so to be conveyed to the said trustees consisted largely of individual property of Eli Kinney, and there existed individual obligations against said Eli Kinney, it was further stipulated in said composition that "as a further security and indemnity to said firm creditors against the claims of the individual creditors of said Eli Kinney being asserted against any of said property so to be conveyed, the said Eli Kinney, (Frank M. Hubbard and William R. Lowe, consenting) hereby agrees to excute a mortgage upon the Chicago property, located in Block 10, conditioned to secure the said firm creditors against all loss or damage resultant to them from the assertion of said claims against said property to the extent of twenty-five thousand dollars." And whereas said trust deed has been duly executed by said Eli Kinney, now, therefore, If the individual creditors other than mortgagee or secured creditors of said Eli Kinney shall not assert their claims against said property so conveyed in trust to an extent to create loss or damage to said firm creditors as above specified, then these presents shall be void, otherwise to have full force and effect in law to the extent of such loss or damage so resultant to said firm creditors to the extent of $25,000. Dated March 1, 1878. Recorded April 6, 1878.

Release Deed. Kyle & Dunham to Kinney. Objected to.

Recites that whereas Eli Kinney, of the late firm of E. Kinney & Co., has made a composition in Bankruptcy with the firm creditors by which he was to convey certain property to Kyle & Dunham as security. That the individual creditors should release any priority they had over the firm creditors in the individual property of Eli Kinney, and Eli Kinney was to indemnify said future creditors against the individual creditors, and to deliver to trustees a mortgage upon the property owned and held by Eli Kinney in Block 10, in the City of Chicago, conditioned for such security to $25,000. And that Martha S. Kinney, in order to release her dower, should join in the composition deed to the trustees; and it was further stipulated therein that upon execution of deed and mortgage and release of dower, and of release of claims of individual creditors as above provided, the said firm creditors, in consideration thereof, agreed to release forever to said Eli Kinney all claim or claims, legal or equitable, which they had or might have in, or to any and all property held or owned by the said Eli Kinney, in Chicago, Illinois; and the right to sequestrate the same to the payment of their debts, and authorized the trustees, as their agents, to execute the necessary instruments to release to the said Kinney forever all claims they might have upon the Chicago property except under such mortgagee. Thereupon in consideration of the execution of the instruments aforesaid; which it recites have been executed, they release to Kinney the claim of the creditors to sequestrate Lots 21 to 36, and S. ¼ 37, Block 10, Walker's Dock Addition, and also any and all other

lots or parcels of land located in said City of Chicago, the said Eli Kinney owns or has any claim in or to, except as under said mortgage.

Dated March 7, 1878. Recorded Nov. 9, 1880.

Deed. Eli Kinney, F. M. Hurlbut and William R. Lowe, to Charles L. Burgoyne, dated March 7, 1878; recorded November 9, 1880. Recites that Kinney had effected a composition with the creditors of firm E. Kinney & Co., a firm composed of Kinney, Hurlbut & Lowe, by which it was stipulated that Kinney would settle with all of said creditors, and take up their claims with the composition notes therein provided for, and secure the payment of those notes by a conveyance to trustees therein named of all the real estate owned by said Kinney except such as is situated in Chicago, Illinois. That Martha S. Kinney, his wife, would join in such conveyance and release her dower in the premises so conveyed. In consideration of which, and that said Martha S. Kinney, and other members of the family of Eli Kinney, holding claims against him, individually assenting that the individual property of Kinney might be conveyed to secure the firm creditors, the said firm creditors agreed to surrender and relinquish "all property or right in property held by said Eli Kinney, or in his name, situated in Chicago, Illinois." Now, therefore, in consideration of the premises and of the adjustment by Eli Kinney of the claims of the firm creditors, and of the execution of the trust deed by him, and the release of dower by Mrs. Kinney in the property so conveyed by said trust deed, and of her right as an individual creditor of Eli Kinney in said property, and of one dollar to them paid by Charles S. Burgoyne, E. Kinney, F. M. Hurlbut and W. R. Lowe (Hurlbut and

Lowe joining in this conveyance to release and convey any equity they might have in said premises as members of said firm of E. Kinney & Co., or otherwise), do grant, bargain, sell and convey to Burgoyne, his heirs and assigns in trust, charged with the trust of reconveying said premises to said Martha S. Kinney, her heirs and assigns forever, Lots 21 to 36, and S. ½ of 37 in block 10, Walker's Dock Addition, and all the estate, title and interest of the said Eli Kinney, Frank H. Hurlbut and William R. Lowe, or either of them, in said premises. And Eli Kinney doth covenant that he is true and lawful owner of said premises, has full power to convey; that the title conveyed is clear and unencumbered, and that he will warrant and defend the same.

Deed from Charles L. Burgoyne to Martha S. Kinney, dated March 7, 1878.

(Objected to.)

In fulfillment of his trust, and in consideration of $1, and other good and valuable considerations to him paid by Martha S. Kinney, remises, releases and quit-claims to her, her heirs and assigns Lots 21 to 36, and S. ½ of 37, Block 10, S. J. Walker's Dock Addition.

This deed is not acknowledged until Feb. 7, 1880, and is recorded Nov 9, 1880.

Deed from Martha S. Kinnney and Eli Kinney, her husband, to Louis Kuhn.

(Objected to.)

In consideration of $1 and other good and valuable considerations to them paid by Louis Kuhn, they remise, release and quit-claim to him, his heirs and assigns Lots 21 to 36, and S. ½ of 37, Block 10, S. J. Walker's Dock Addition, dated and acknowledged Nov. 16, 1880; recorded Nov. 17, 1880.

Deed from Louis Kuhn to Berthold Loewenthal.

(Objected to.)

In consideration of $1, remises, releases and quit-claims to Loewenthal same lots. Acknowledged Nov. 16, 1880; recorded Nov. 23, 1880.

Tax deed.

(Objected to.)

Recites sale on 3rd November, 1873, of Lots 21 to 36, in Block 10, S. J. Walker's Dock Addition. The non-redemption and compliance with the laws entitling him to a deed, conveys the lots to Jacob Rosenberg. Dated March 22, 1876, is indorsed with Section 22 of Revenue Act, and filed for record March 25, 1876.

Deed. Jacob Rosenberg and wife to International Bank, dated April 15, 1876.

Consideration, one dollar, quit claims among a great quantity of property Lots 21 to 36, in Block 10, Walker's Dock Addition; recorded Jan. 31, 1877.

Master's deed to Jacob Rosenberg.

Dated Sept. 27, 1879. Recites that in pursuance of a decree entered on April 25, 1878, by the Circuit Court of Cook county in a certain cause then pending therein, on the chancery side thereof, wherein in the original bill Augustus Bauer was complainant and Samuel J. Walker and others were defendants, and in a cross-bill, Leopold Miller and others were complainants, and Samuel J. Walker and others were defendants, etc., not setting out anywhere the title of the cause in full, the premises were advertised and sold June 24, 1878, to Jacob Rosenberg for $54,500 cash, being the highest bid, and not being redeemed, conveys to Rosenberg Lots 21 to 36, in Block 10, S. J. Walker's Dock Addition to Chicago. Recorded March 13, 1880.

Contract between Loewenthal, Rosenberg and Kinney.

Dated February 15, 1880; recorded Feb. 27, 1880. Recites that a decree was, on April 25, 1878, rendered in Cook Circuit Court, in the case of Bauer, complainant, and S. J. Walker and others, defendants (G. D. No. 12,962), for sale of lots 21 to 36, in block 10, S. J. Walker's Dock Addition to Chicago, and that said lots were, on June 24, 1878, in pursuance of said decree, sold by the Master "to said Jacob Rosenberg, who became the purchaser thereof, for the benefit of all the parties interested therein, under the provisions of said decree." That on Sept. 20, 1879, a Master's deed was made to Rosenberg. That "there is now pending in the Appellate Court for the First District of the State of Illinois, a writ of error sued out by Samuel J. Walker. and now prosecuted by Robert E. Jenkins, his assignee in bankruptcy, to reverse said decree;" and there is also pending in said Appellate Court an appeal by said Eli Kinney touching certain matters in connection with said suit. And whereas it is deemed by all the parties to said litigation, who are interested in said premises, that the same during said litigation should be docked and put into a condition suitable for lumber yard purposes, and leased for the benefit of the parties interested therein. Now, therefore, it is agreed by the parties hereto as follows: That Loewenthal should at once proceed and cause the premises to be docked and put into condition for lumber purposes; advance all moneys necessary for that purpose, the contracts and plans for such improvements to be mutually agreed upon by Loewenthal and Barker, as attorney in fact of E. Kinney; Loewenthal to rent, subject to approval of Barker as such attorney in fact of E. Kinney. Rosenberg agrees

to sign any lease or leases they, Loewenthal and Barker, request him to sign. That if Loewenthal does not rent the premises by March 1, 1880, then Barker, as attorney in fact for Kinney, may do so, subject to approval of Loewenthal. That Loewenthal shall advance all money necessary to pay, and shall pay all taxes and assessments against said premises and clear the same from all tax deeds, certificates, and all other tax liens. That he and Barker may settle all other liens, except as to the Honore-Wilshire mortgage Kinney is to be consulted personally. That they may redeem from sale, under the Shelby mortgage, the money for which shall be advanced by Loewenthal, and he is authorized to make all necessary expenses to eject present occupants from the premises and to advance money necessary therefor. That he shall receive interest on all advances made by him under this agreement at 8 per cent per annum, payable annually, which shall also be in full compensation for his services, to be reimbursed therefor out of the rents of said premises as fast as the same are collected. "That all of said advances, until they are fully refunded to the said Berthold Loewenthal, shall be and are hereby made the first lien upon said premises and every part thereof; said lien to be, and the same is hereby made, prior to all interests in the litigation aforesaid." That after the premises have been rented as aforesaid, Loewenthal shall collect all the rents and have sole control and authority over the tenants and of the premises under them until he is fully reimbursed for his advances and interest, and if so reimbursed before termination of litigation, "he shall continue to collect rent and have control of said premises, as aforesaid, until said litigation shall be disposed of, for the benefit of the parties who

may then be under the decision of the Court, entitled to said premises and rents to which parties said Loewenthal hereby agrees to then account therefor, and said Rosenberg agrees to assign said lease, or leases, to such party. That if said decree should be reversed in whole or in part, and said premises should be again sold, then the purchaser shall take the same, subject to the lease so to be made by the said Rosenberg, and out of the proceeds of such sale said Loewenthal shall first be reimbursed for all advances so to be made by him as shall then remain due him, and such advances shall be a first lien ahead of all mortgages and trust deeds upon said premises, and neither said Kinney, nor any other person, shall have any relief, except subject to the right of said Loewenthal, to be fully repaid for all his advances." Loewenthal to account for and credit rent received by him at the date received.

Stipulation, at the foot of this, made by Perry J. Dunham and John Kyle, Trustees, for the creditors of E. Kinney & Co., to whom was made the mortgage, recorded April 6, 1878, by which they agree that the lien under that mortgage shall be subordinated to the prior lien reserved in the above agreement. Dated the ——day of February, A. D. 1880, and acknowledged the 25th February, 1880. Recorded Feb'y 27, 1880.

A. C. Badger, called by defendants:

I did have a contract between me and Eli Kinney pertaining to certain litigation touching the premises in question; I gave it to Mr. Kinney about a year ago; I have not got it now; a certain supplemental contract which I had I also gave back to Kinney. The effect of giving them back was to cancel it.

Counsel offers to read copies of them. Objected to, but not because they are copies. Objection overruled.

Contract between Eli Kinney and A. C. Badger.

Dated June 17, 1878, recites that "whereas Eli Kinney owns" Lots 21 to 36, Block 10, S. J. Walker's Dock Addition, * * * and the International Bank, and others have claims or pretended claims, which they are seeking to enforce against said land. Badger agrees to contest the claims without expense to Kinney except for Court costs, etc. On removal of claims to said lots is to pay Badger $12,000, and advance $500 towards carrying to higher court the case of the International Bank v. Walker.

Witness resumes: This contract was signed by Kinney and myself. I retained in connection with it as counsel, Burgess & Barker. Kinney required them to act as counsel.

Letter read, signed by W. T. Burgess and Joseph N. Barker, addressed to Eli Kinney, dated Chicago, June 17, 1878; states they have been employed and retained by A. C. Badger to prosecute the legal proceedings under his contract of that date with Kinney in regard to Lots 21 to 36, Block 10, Walker's Dock Addition.

Witness resumes: Barker & Kinney had some arrangement afterwards, by which Barker was Kinney's special attorney. Burgess entered upon this case, and was assisted by Barker. The arrangement between them I don't know anything about. They prosecuted the matter in the Appellate Court and the Circuit Court, under the arrangement I made with them, except what Barker did under his arrangement with Kinney, with which I had nothing to do. There was a modification of this contract.

Letter dated Aug. 23, 1878. Objected to.

To Eli Kinney, by J. N. Barker, advises him that

record is ready; asks him to send $400, part of the $500 he was to advance under contract with Badger.

Supplemental agreement of Kinney & Badger. Objected to.

Refers to agreement of June 17, 1878, that the lots have been sold for $54,500, and agrees that if Badger recovers the proceeds of lots, instead of the lots, he shall be paid $12,000, or in that proportion for any sum which may be recovered for said lots. Dated Sept. 15, 1879.

Witness—That was signed by Kinney and myself.

Letter. Barker to Kinney. Objected to.

Dated April 27, 1880. Advises him that the Appellate Court has reversed Kinney v. Bauer.

Letter. Kinney to Barker.

Dated May 27, 1880; acknowledges letter of April 27, 1880, and is much pleased with the intelligence thereby communicated.

Letter. Barker to Kinney.

Dated May 22, 1880; advises of the decision in favor of Jenkins by the Supreme Court of Jenkins v. Greenebaum.

I went out with Loewenthal to see your 1,600 feet yesterday, and I found the piling all driven except about 300 feet. The office is about 34 feet from your north line, and the other office 834 feet south of north line of your lots. They are each 22x32, two stories high, are nice and comfortable offices. The north end of the piling was put out with the water 40 feet east of dry land; when the filling was put in it all went out into the river. We had to put in a third row of piling, so as to have any anchorage for the north 800 feet. Too bad, was it not, for Walker to permit those brick men

to dredge the clay out of the lot for the pittance of $300 a year, and yet so it is, and will cost thousands to pay for those hundreds. But we feel sure the property will be yours now, and you will only be liable for the improvement.

Letter from Kinney to Barker.

Dated Oct. 23, 1880. Thanks him for the progress made in the celebrated suit of mine, No. 10.

Letter from Kinney toBarker..

Dated April 30, 1880. Acknowledges letter of 27th inst.; is pleased with progress made in suit, and if "you succeed you shall be well paid."

J. J. Glidden. Deposition taken by Loewenthal, Feb. 11, 1882.

I reside in Cincinnati; am a practicing lawyer; I have known E. Kinney many years; I was attorney for the bank of E. Kinney & Co. at time of its suspension. The firm was composed of Kinney, Lowe & Hurlburt; I was the attorney of E. Kinney & Co. in the bankruptcy proceedings, and the attorney especially of Eli Kinney and his family, and took part in proceedings finally resulting in the composition with the creditors of the firm of E Kinney & Co. Kyle & Dunham were the trustees. The composition speaks for itself. After the suspension by the firm, negotiations were opened at once between Eli Kinney, who was the only member of the firm possessing any large property interest or any considerable property interest, and the creditors of the firm for an adjustment, finally resulting in the appointment of myself representing Kinney and the firm of E. Kinney & Co., and certain claims and rights held by the members of Mr. Kinney's family. The result of those negotiations are embodied in the composition, by the pro-

visions of which, in effect, the creditors of E. Kinney & Co. agreed to surrender all claims that they had, either in law or equity, to the property referred to (the lots in block 10) in consideration of the release by Mrs. Kinney of her dower in the individual property of Mr. Kinney, and in further consideration of the release of all claims of prior equities in the members of Mr. Kinney's family against his individual assets and property, which was to be conveyed to the trustees for the benefit of the firm creditors, and in further consideration of the conveyance by Mr. Kinney of that individual property; that is the substance as near as I now recollect. There was a conveyance by Kinney and his wife to the trustees of his individual property, and she relinquished her dower. The members of his family executed a release in compliance with the terms of the composition. Mrs. Kinney received for her release of dower, and of her individual claim against the individual property of E. Kinney, a conveyance from Eli Kinney through a trustee, of whatever interest Eli Kinney had in the property described. The conveyance, if I remember rightly, is in the form of a general warranty purporting to convey the fee. This committee of creditors sent a committee, consisting in part of themselves, to Chicago to investigate Mr. Kinney's claims to property in Chicago, and to this particular property; the result of their investigation was a report to the effect that Kinney's claims then were of little value; that the property itself was very valuable, but the question which they considered as making comparatively valueless Kinney's claims were the litigation and other questions involving the title to the property, and the arrangement was, it being understood whatever interest Kinney did have then he

held in trust for the benefit of the firm, and not in his own individual right, that the firm creditors would agree to transfer that interest, whatever it was, to Mrs. Kinney and the family, as a consideration for the surrender of her dower interest and their individual claims; that was the substance of the transaction as I understood it. I know of no facts and can recall none bearing upon his mode of treatment of this property, except such as appear of record. The manner of conveyance is a matter of record. The deed speaks for itself. I will say here that I have no recollection of Mr. Kinney at any time ever having stated to me as to what the real character of his claim was. It is some time ago, and if he ever did so it has escaped my recollection. I represented Mr. and Mrs. Kinney in the sale and conveyance of this property by Mrs. Kinney to Loewenthal, or to Kuhn for Loewenthal. I corresponded with Loewenthal as president of the bank, in the first place seeking an adjustment of this matter. I also called once, and I think likely twice, upon Loewenthal in Chicago in reference to the same matter. This correspondence and my calls upon him ran through a considerable space of time; finally Loewenthal came to Cincinnati—I cannot recollect the date, and negotiations were then entered into between myself and Loewenthal, I representing Mr. and Mrs. Kinney also, whereby I sought to effect a sale to Loewenthal of all the interest that Mr. and Mrs. Kinney, or either or both of them, had in the property in Chicago that has been referred to; these negotiations continued through several days, and finally resulted in a sale whereby Mr. and Mrs. Kinney quit claimed all interest they had in that property to Kuhn for the benefit of Loewenthal or the Bank, as the case

may be, for $20,000, which was paid by Loewenthal, $10,000 in cash and $10,000 within ten days, or a short time. It was paid to Mrs. Kinney. I saw Mrs. Kinney during this negotiation. She understood the subject matter of the negotiation at the time. I went to Kuhn's bank, and my recollection is, the $10,000 was paid over and placed to the credit of Mrs. Kinney. That is my recollection—it is some time ago, and my attention has not been particularly called to these transactions for some time, but still I feel pretty positive my recollection is correct.

Cross-Examination: I acted in this matter as the attorney for Kinney and his wife, and also as the attorney for the firm employed by Mr. Kinney. I have heard of notes of Samuel J. Walker held in Mr. Kinney's possession that I understood were given to the firm for his indebtedness to it. There was no connection between these notes and this land to my personal knowledge. I know nothing about the matter. I would not undertake to say that I heard from Mr. Kinney, or from anybody else at the time of the suspension of payment, of any connection between those notes and the property in controversy, nor would I undertake to say I did not; it is simply a matter about which I have no recollection.

Joseph N. Barker, in open court: Am a practicing lawyer; know Eli Kinney. Have known him four or five years. I have a power of attorney from him relating to property generally. I have the power of attorney (and produced it.) I drew it myself. It was signed by Kinney.

Power of attorney.

(Objected to.)

Kinney authorizes Barker, as his attorney, to lease any land he owns in Chicago, and to make, execute and deliver any contracts or agreements pertaining to his lands in Chicago or Cook County, with power of substitution, dated March 22, 1879.

Witness: I acted under that power. I believe I signed a lease made by Rosenberg under the agreement offered in evidence between Loewenthal, Rosenberg and Kinney. The property expected to be leased at the time the power of attorney was drawn were these lots, 20 to 36.

I should say, I first became the attorney of Kinney about 1878, with reference to his matters generally. I was employed in the first place to defend the Bauer suit. I was with Burgess in that case. The records show what I did. I presume what is stated in the record is correctly stated. I assisted in drawing some of the pleadings. After the case was opened up for Kinney to defend, Burgess drew the pleadings. I was acquainted with them. Saw them. Knew what was in them. I suppose Kinney gave information. He consulted with me at the time, and before they were filed, about them; and the answer and cross bill contained the facts as represented by him to me. I represented Kinney in the litigation in the Appellate Court, wherein Kinney was a party. That case was taken by Kinney to the Appellate Court. There was a decree against Kinney in the court below, which was taken to the Appellate Court and reversed. I acted in the matter of removing the main decree to the Appellate for Jenkins, which was sued out June 18, 1878. It was sued out at the instance of Walker. Up to the time of the decree I represented Walker, and after that I represented Jenkins. I was not

employed by Kinney at that time. I had not known Kinney at that time. I did not draw the bill filed in the U. S. Court in June, 1878. Burgess did. I knew the bill was to be filed. Was with Burgess representing Jenkins. I had consultations with Jenkins pertaining to this matter. Jenkins signed the bill. I don't know whether he read it or not.

After the date of the decree in the Bauer case, Burgess prepared all the pleadings. I have probably seen the contract offered in evidence between Badger and Kinney. I recollect the letter Burgess and I sent accepting the employment, and probably knew the terms of the contract at that time. I knew about the preparation of the contract between Kinney, Loewenthal and Rosenberg about leasing the property. I advised with Kinney about it. He was here and signed it. Am familiar with its contents. I signed the lease shown me as attorney in fact for Kinney.

Lease from Jacob Rosenberg, trustee, to Gray and Sheppard, dated February 25th, 1880. Leases lots 29 to 36, block 10, Walker's Dock addition, for lumber yard purposes only, from May 1, 1880, to April 30, 1885, at a rental of $30,000, in monthly installments of $500 each. Rosenberg covenants to make certain improvements at his own expense by the 1st of May, 1880. Gray & Sheppard to do their own planking and be paid its value at the end of term. Recites that it is made in pursuance of contract between Kinney, Loewenthal and Rosenberg. It is signed by the parties, and "I approve of the above lease. Eli Kinney, by J. N. Barker, his attorney in fact."

Witness is shown another lease and says, It is approved by me.

Lease from Jacob Rosenberg, trustee, to Louis Sands, dated February 25, 1880. Leases lots 21 to 28, block 10, Walker's Dock addition, for lumber yard purposes only, from May 1, 1880, to April 30, 1885, at a rent of $30,000, payable $500 each month. Rosenberg covenants to make certain improvements at his expense by May 1, 1880. Sands to do his own planking and be paid its value at end of term. Recites that it is made in pursuance of contract between Kinney, Loewenthal and Rosenberg. It is signed by the parties, and "I approve the above lease. Eli Kinney, by J. N. Barker, his attorney in fact."

Witness: I superintended for Kinney the improving of this property, building docks, etc., to a certain extent representing him under that agreement. I went out there several times, usually with Loewenthal, never with Kinney.

Kinney was here, and Glidden, from Cincinnati, at time contract was being drawn, consulting about it. Burgess was there, and Badger part of the time. Burgess and Badger were familiar with the terms of the agreement. I advised with them. I notified Burgess that such an agreement was about being made and he came over I had no conversation with Jenkins during that period of time with reference to this contract.

I talked with Badger more or less about this contract.

I was not present when the testimony of Walker in the Bauer case, read by Burgess, was taken. I did not know of it until quite recently. I came into the case a day or two before the testimony was closed. I had only one branch of the case prior to that time.

J. S. Hair, in open court:

I live in Chicago. Know Eli Kinney, of Cincinnati.

I saw him about 1879, at our lumber yard, on Paulina street. Was then in the lumber business. (Is asked for a conversation with Kinney. Objected to and received.) I desired to lease from Kinney a piece of property to enlarge my lumber yard, right across the street, which he said he owned and controlled. He came up for the purpose of looking after it, and opened negotiations with me for the leasing of it. He said he would lease it to me I had lumber piled on his ground, that he said belonged to him, and he said if I would look after the ground for him until he got the title satisfactorily straightened out, he would lease it to me. He said there was some little trouble between him and Loewenthal, I believe it was. He claimed title to it or I would not have talked to him at all. Had no objections to my keeping the lumber piled there if I would look after his lot. There were men taking dirt off the lot for manufacturing brick. He made arrangements with me to look after the lot in lieu of rent. He charged me no cash rent. I saw him afterwards in Baker's office in regard to leasing the property.

This property is on slip 8, east front, west front on Paulina street, and south on Blue Island avenue, in Walker's Dock Addition. Runs down to the river 1,600 feet.

A. C. Badger, re-called by defendants.

Since Walker's bankruptcy I have acted for the estate through Jenkins, under his authority and direction, from the time of his appointment. As I would remember now, I furnished Burgess information touching Kinney's right at or prior to the drawing of the pleadings generally memoranda from the records and memoranda from such other pleadings as had been in cases—

various memoranda of that kind. Burgess knew of the contract I had with Kinney. I drew that contract. I did not submit it either to Burgess or Barker. I made the supplemental contract myself, and did not consult with either of them.

My recollection is I was present at all the testimony of Walker taken in the Bauer case. I cannot say when my attention was for the first time after it was taken called to it. I should suppose this testimony was not in my mind when I drew this contract. I have no doubt I heard it, because my recollection is I heard all the testimony. I don't remember of the exact words being spoken, but I remember your asking questions right in the case in regard to those various properties, and your annoyance that Walker made such long answers. I remember that distinctly, but I can't remember the distinct words. I remember that fact. I can't answer whether or not I recollected this testimony of Walker's at the time I and Kinney executed that contract, because I don't know, but I would suppose that it was not in my mind at that time, not as to the supplemental contract. But it may or may not have been; I have no distinct recollection about it. I would suppose at the time the pleadings were drawn for Kinney in the Bauer case it was not prominent in my mind. That is the probability.

I knew about this contract between Rosenberg, Loewenthal and Kinney at the time. I have no doubt I talked with Kinney about it, and with Burgess and Barker. Burgess went round, examined the contract, made some suggestions, and then, I think, looked after it, acting for Jenkins. And I looked after it, acting for Jenkins. I was not present when it was signed, but

knew of it soon after. Don't think I read it, the contract, but knew about the general features of it. Knew that leases were made on the basis of it. I had a conversation with Jenkins about the contract. He was informed as to what was being done. I have no doubt I informed him; that is my habit and custom.

Jenkins and I have occupied adjoining rooms in the same building as offices since two years the first of next May. Since Jenkins' appointment as assignee I have constantly had conversations with him as to the condition of Walker's estate.

Cross-examination: Burgess was there in the getting up of that contract representing Jenkins' interest in the land. My recollection how he came to be there is that I informed him such a contract was being made, and requested him to look after it and Jenkins' interest—as to what was said while the contract was being drawn up. I don't recollect Rosenberg being there. My recollection is I was present in a discussion at several interviews. Loewenthal was there. I don't remember that anything was said on the particular question as to whom Burgess represented at the time. Barker represented Kinney during these negotiations. Burgess did not pretend to represent any one but Jenkins during these negotiations. I remember distinctly asking him to represent Jenkins, and asking Barker to represent Kinney. I told Kinney there were other interests to be looked after by Burgess, and, therefore, I preferred in his own individual matters that he would have Barker specially appointed to look after his interest. My recollection is that Burgess drew up the pleadings in all the cases wherein Jenkins, as provisional assignee or as assignee, has been complainant, and that he has drawn

all the pleadings when Jenkins has been defendant since his appointment in bankruptcy, and since then Burgess has acted as his solicitor or attorney. Barker has acted for Walker in the bankruptcy proceeding prior to the adjudication and since. In some instances he has acted jointly with Burgess for Jenkins to a certain extent.

By A. M. Pence:

Q. Mr. Burgess was also acting for Kinney? A. Mr. Burgess was for Kinney in drawing up the pleadings in that petition.

Q. And is fighting me? A. Yes, sir, I suppose, because the Kinney interest and the Jenkins interest are the same.

Direct resumed: I know about the notice that was read being served on Pence.

I remember the time that note was written and the circumstances of it. I knew Kinney had been here.

About that date Kinney was in the city; was here two or three times. I knew from Kinney and Loewenthal that he had been here to make an arrangement.

Q. Do you know anything from Loewenthal about the fact of Kinney being up here about the date of that note? A. I know negotiations were going on for an effort to settle.

Counsel for the defendant moved that the above be stricken out.

The Court: That testimony is improper unless you know it from Mr. Loewenthal, and if so, state what you know.

The last above answer was stricken out, to which ruling the complainant excepted.

Direct resumed: Q. What do you know about that from Loewenthal? A. I knew from Loewenthal at

the time the negotiations were going on for a settlement.

Mr. Pence: For what settlement? A. A settlement that Kinney & Loewenthal were trying to make; a settlement they were negotiating to see if they could not get rid of this litigation.

Q. Let us see what Loewenthal said. Now, what did Loewenthal say?

Mr. Burgess: Well, what was said?

The Court: If you knew anything from Loewenthal, state what he said. A. I don't think I could give you the details of any conversation except the single fact that they were negotiating.

Q. Well, did he tell you they were negotiating? A. Yes. I think there was a conversation with him as to an amount as to how it should be settled. I think the conversation referred to how it should be settled—some details as to how—but there were more conversations with the other man, and I would not like to state the exact words stated to me by Loewenthal.

The Court: You think Loewenthal conferred with you as to how it should be settled. A. That was the substance of a portion of the conversation.

Mr. Burgess: What was to be settled?—the suit, or what was it? A. To see if we could not settle in regard to this particular property as far as he and Kinney were concerned, so as to get Kinney out of this suit, eliminate Kinney from this suit and this property.

Q. Did you communicate that fact to me, and how soon? A. I did; well, at once, probably the same day.

By Mr. Pence: Q. Well, now, you would not be

willing to swear, Mr. Badger, would you, that Mr. Loewenthal ever told you of any definite negotiation he was having with Mr. Kinney for the settlement of this lawsuit, or for the purpose of buying out Mr. Kinney's interest, would you? A. I don't believe that matter progressed far enough for him to have stated there was anything definite.

Q. The most you gather there was some talk about it? A. That there was an effort. Mr. Kinney told me that he came here for that purpose once.

Q. Not when Kinney and Loewenthal were together he told you that? A. I don't think I saw them together at that time,

Counsel for defendants moved that the last answer be stricken out; which motion was granted, and complainant excepted.

Direct resumed.—When this contract for Loewenthal was being gotten up I saw in connection with it Loewenthal and Mr, Ahrens as his counsel.

Admission.—Mr. Pence, I will admit I was solicitor in the Bauer case and in all the litigations pertaining to the premises in question while being carried in the courts for the Bank, Bauer, Loewenthal and Schoellkopf.

Berthold Loewenthal in open court.

I am president of the International Bank. Have been so nearly twelve years. I was appointed receiver in the Bauer case after the sale of the premises under the decree of April 25, 1878. The only act I have done in relation to these premises I attempted through my attorney, Mr. Ahrens, to have these parties who occupied the brick yard on the premises surrender possession to me in the first place, or pay rent, if he could not get them removed. I instructed my attorney to take the necessary steps.

Order of May 20, 1879, in the Bauer case read.

The motion of the receiver herein for leave to file his petition as to Christian Hupe and Frederick Kritenstein is overruled without prejudice.

Witness.—Mr. Ahrens made application to file a petition to have these parties removed.

There was nothing else done by me as receiver, because I was not appointed until March, 1879, and this party being in possession of the property, nothing could be done. It was necessary to have the property clear before any steps could be taken towards improving it, and on 25th Sept., 1879, the purchaser at Master's sale was entitled to a deed.

After that time Rosenberg took charge as trustee. He virtually did nothing; whatever was done was done by me for him; I was acting in his behalf. He was trustee for the parties, the International Bank, myself, Bauer and Schoellkopf, He purchased in the premises for us generally, whose interests were established by that decree.

About this contract between Rosenberg, Kinney and myself I had no conversation with Kinney until he came up here at the time it was consummated, I think signed; my negotiations were with Barker. Barker had application from a number of lumbermen who wanted to rent the premises. We met, I don't recollect how often, or what time, but we both agreed that it would be better for the interests of all concerned, if an agreement could be reached by which this property could be improved and a revenue derived from it. It was not docked at that time; it was in a chaotic condition, and Barker, from time to time, told me that he was corresponding with Kinney; that Kinney was going to come up such a

time, and really did come up, but he did not see Barker. Then he came again, and so came several times for several months, until finally Barker and I agreed to draft an agreement which would cover the point, which Barker said he would send to Cincinnati. He said he could sign it himself, of course, he had a power of attorney to do so, but he did not want to do that. He would rather Kinney understood fully all the conditions of the contract, and he would send it down to him. I engaged Mr. Ahrens to draft the agreement. It was submitted to Barker, and I think we had substantially agreed upon all the points, when a search of records disclosed the existence of this mortgage, by Kinney to Kyle and Dunham, and Aherns advised me it would be necessary to have their consent before it was finally consummated. We had virtually rented the premises before the agreement was finally made, that is we had selected our parties and had agreed upon the details. They were anxious to get possession, and Barker and I concluded to send Ahrens to Cincinnati to see Kinney and get his consent. Ahrens went, but Kinney was not satisfied with the draft, and came up with Glidden to Chicago on a Monday morning. Ahrens advised me of it, and shortly after I went to Barker's office, and met Kinney there. Glidden came in shortly afterwards, and then Burgess and Badger came. Then the points that Kinney objected to were all discussed, and we agreed upon everything, except the rate of interest which he was to pay to me for the advances in making the improvements, and other advances I agreed to make. Kinney thought he could get the money for 7 per cent., and it was agreed between Barker, Kinney and myself that the rate should be fixed at 8 per cent., but Kinney

might, if he could, advance it at 7 per cent. and it was finally signed as it is here. Kinney signed it outside of the bank. Barker and Glidden came with his signature and obtained mine and Rosenberg's if he was there. Badger and Burgess were present in Barker's office in the forenoon when the points of dispute were adjusted—Burgess participated in the conversation. Badger was more of a listener; don't recollect that he participated in it. There was no interest of Jenkins mentioned at all, neither Badger nor Barker said anything, none of them; I supposed they all represented Kinney's interest, except so far as they represented their own. I had no idea that they represented anybody else, at least there was nothing said.

These improvements I have made on the property cost over $30,000. The bank advanced it under my contract.

Nothing was said to me at that time with reference to any interest of Jenkins in these premises, no mention of any interest. I did not at that time know of any interest of Jenkins in these premises. I had no notice of that kind. Rosenthal & Pence did not represent me in the matter of that contract, Ahrens represented me, at least from the time I called upon him to draft the agreement. I represented myself with Barker. There was no one else assisted me in the negotiations until we came to draft the contract.

Barker never said anything to me that would lead me to believe anybody else had any interest in these premises except Kinney.

We met very often while these improvements were going on. I always understood he represented Mr. Kinney, who claimed the equity in the land.

I never knew of any such letter as that testified to by Burgess, as served on Pence, on the 14th January, 1880, until sometime after I purchased Kinney's title to the premises, when Burgess filed a bill praying the Court to declare a lien upon these premises, to cover their contract which they have with Kinney. Their attorney's fees. That was in December, 1880, after I had the title and paid my money.

I did not prior to this contract between Kinney, Rosenberg and myself, tell Badger there were negotiations for a settlement with Kinney, as it was not true. There were no negotiations pending at that time whatever.

About the time of the decree in 1878, there was a proposition made by Kinney, but none afterwards until in November, 1880.

Having detailed conversation with Glidden about a settlement in the summer of 1880, and a letter received from him, the witness says: "I am quite confident that I never said a word to Pence or Rosenthal in regard to this conversation with Glidden, nor in regard to the letters which I received from him, "nor did I ever, until a day or two before I started to Cincinnati, communicate with Pence any intention on my part to go there for the purpose of acquiring the Kinney title.

Mr. Burgess—and settling this suit? A. Well, that carries it with it, I suppose. I supposed we settled; I found since that we did not."

Mr. Pence.—Pence, nor Rosenthal & Pence, nor Rosenthal were retained by me in the negotiation for the purchase of these premises. I negotiated that myself.

I first learned that the title to these premises was in Mrs. Kinney after I got to Cincinnati. I did not think the

title papers were of record; they were recorded Nov. 9, 1880, I got the deed Nov. 16, 1880. I was there a week, so I judge the papers were recorded while I was there What I did in Cincinnati in reference to the purchase of these premises was, I saw Glidden, and he spoke to Kinney. We talked the matter over ourselves that day, and as Kinney could make no bargain without consulting his wife, we went out into the country next day and saw her, and we talked the matter over there with her, and she agreed to come in the next day, but did not. Kinney came in and said she would come the next day. She did come in, as I learned, but I did not see her That morning Kinney came to Glidden's office; negotiations were continued and finally agreed upon the price, and then Kinney went for Mrs. Kinney. The papers were all prepared and executed, and the money paid as I agreed to pay it. She was to receive $10,000 in cash upon the delivery of the deed, and $10,000 was to remain in escrow with Kuhn & Son, subject to the condition that Mr. or Mrs. Kinney, or both of them, should execute any papers that might be necessary to complete the transfer, according to an executory agreement which was entered into between us at the same time. $10,000 was to be kept back until we authorized the payment of it—until we found out that the record was all right and they executed all necessary papers. The cash payment of $10,000 was paid to Mrs. Kinney in the shape of a certificate of deposit to her order for $10,000 in currency, which she accepted. The other $10,000 were paid. I, of course, can't say the exact day. We were charged the full amount of $20,000 on that day—that is, Kuhn & Son held the $20,000 in escrow, and it must have been ten day or two weeks before we authorized it to be paid.

Kinney constantly claimed title to these premises, and I supposed the title was in him until we came to Cincinnati and found it in his wife. He explained how that was. Kinney brought suit against me and the Bank in the U. S. Court—the one offered in the evidence. During the pendency of that suit he and his attorney, Dunlevy, came to my office and we discussed our respective rights to these premises. He claimed he was the owner in fee.

I heard the testimony of Walker in the Bauer case read here the other day. I certainly have not the remotest recollection that I did know that Walker testified as is shown by the testimony read until since my purchase. I have never seen the testimony myself; have never read it; but understood sometime ago, when Burgess first attacked this conveyance to me, that there was such testimony.

I knew about Kinney's proceedings about opening up the Bauer suit, and his claim in that suit, and his claim when he filed the bill in the U. S. Court, and when he made this contract about renting the premises. All that was said and done by Burgess, Badger or Barker would lead me to believe nothing else except Mr. Kinney was the only person who claimed title to that property. They never even intimated that anybody else had any claims either in court or out of court. They stood by when this contract was being drawn up, knew the matter was going on, and never said anything, and I supposed they represented Kinney only, except so far as they represented themselves. I supposed when I made this contract I was negotiating with the owner.

Cross-examination. There were other papers executed at Cincinnati aside from this, and the releases of

errors which we subsequently filed in court were not executed at that time. They were executed a few days afterwards. They were a part of the transaction. That is, Kinney at the same time agreed to give this release of errors, too. They were not in proper form.

Q. Well, who reduced them to proper form for you? A. Mr. Ahrens.

Q. Did you have Rosenthal and Pence prepare them? A. I think not; not the release of errors. I don't know.

Q. Well, they prepared some of the papers executed? A. Well, that may be. I don't remember now.

Mr. Pence: After you got back from Cincinnati? A. After I got back from Cincinnati? Yes, sir.

Mr. Burgess: The papers were not right and you submitted them to Rosenthal and Pence? A. I wouldn't wonder if I submitted some of them, perhaps all, when I came back.

Q. And then the papers were sent back as corrected? A. My impression is some of these papers were rewritten by Mr. Ahrens.

Q. Yes; but at whose suggestion? A. I don't know. I think I consulted Mr. Pence when I came back in regard to the papers I received from Mr. Kinney while down there.

Q. And those papers were corrected at the suggestion of Mr. Pence and then copied? A. Well, yes. I think so. Mr. Pence and Mr. Ahrens perhaps acted together in that matter.

Re-direct. By Mr. Pence: Q. The money had been paid in Cincinnati and you returned here to Chicago before that correction was made when you consulted me? A. Yes, sir.

The Court: The money was paid before he left? A. The money was paid before I left Cincinnati?

Mr. Pence: Yes; $10,000? A. Yes; I had paid, or rather authorized S. Kuhn & Sons to charge the International Bank with $20,000, of which they should pay Mrs. Kinney $10,000 at once; and hold $10,000 in escrow subject to the compliance of Mr. and Mrs. Kinney with the executory agreement that they would make all necessary papers or all papers that were deemed necessary after I got home.

Q. And this release of errors was one of the papers deemed necessary, and which fell under your executory agreement, was it? A. Yes; covered by the executory agreement.

Mr. Burgess: Q. You sent them back before the last money was paid? A. Before the last $10000 was paid? Yes, sir.

Q. And if they had not executed the papers you would have (with)drawn the $10,000 then, would you not? A. Well, I don't know what I would have done.

Mr. Pence: It was left in escrow?

Mr. Burgess: Depending on papers to be drawn and executed.

Witness: There was an executory agreement that they were to execute all papers necessary to complete a perfect title and to discharge from litigation growing out of this land, and everything.

The Court: We understand that we have been over it two or three times.

Defendants rest.

Complainants recall A. C. Badger.

In a conversatiou with Kinney, shortly after Jenkins was appointed assignee, I was urging Kinney to join his

debt with those debts I then controlled. That I was handling a large amount of debt—had succeeded in getting Jenkins elected, and was working for the estate through Jenkins. It was then that he told me why he did not want to prove up his claim, or why he did not prove it up.

The Court: Did he tell you why he did not prove his claim? A. He said that the property was security for his debt, and that when the property was made clear then he would have a piece of property that would be very valuable, and would enable him to collect most of his debts. I am giving you the substance, not the exact words. The property had a previous incumbrance on it which Walker had agreed to take off; that if the property was then clear of that incumbrance that he would hold a very valuable piece of property to secure his debts with. It would be very valuable after it was clear. This conversation I testified to before.

Cross-Examination. I took this contract from Kinney before Jenkins was elected.

I made the contract with Kinney because I knew that he had a deed to the property, but whether I knew at the time all the details of it, I do not suppose I did because of my action after the election. My understanding, when he came into the Bauer case, simply was that e came in to defend his own rights in the matter, and to protect himself, that he held the deed.

At the time I made this contract with Kinney I judged his title from the record.

Mr. Burgess: Then the testimony that was given by Mr. Walker on his examination, have you heard that? how was it in reference to it?

The Court: He testified that he did not have that in

his mind when he made the contract. He need not go over it again.

William T. Burgess: At the time the application for receiver was made I was notified to appear before Judge Williams, and my recollection is clear that I stated then that I appeared for Jenkins as assignee in bankruptcy. If there was any notice served on any one I do not find it among the papers. Soon after the adjudication in bankruptcy, and the appointment of Jenkins, it was concluded between Mr. Barker and myself to make application to the U. S. Court to stay the sale of this property, and if possible put the matter in the U. S. Court. I prepared the papers that were filed in that case, except some which I took round to Mr. Barker's office to have copied. They were not finished in time; I took them and finished them myself, and substantially prepared the whole of the bill that was filed for that purpose. Sometime after that it was determined, as Barker was Walker's solicitor in bankruptcy, that I should act as solicitor for Jenkins alone, and that Barker should not act in the matter. This was in 1879. The Kinney papers were drawn up by me, and I think all in my handwriting. I drew them up from information derived from the files of the case of Bauer vs. Walker, as it was at that time. The statement of Kinney's ownership of the property was stated from the statement that was made in that case, and there are two reasons in my mind why a change was not made; that if I was aware of the testimony of S. J. Walker in reference to this property having been held as security I did not put in because it slipped my mind for the time being, and that it was not a material question in the case. Since the time of the separation of Mr. Barker

and myself, the papers, all the pleadings in the cases, have been carried on in my name exclusively, as the records will show. Alluding to this contract between Loewenthal, Rosenberg & Kinney, I went there and was present during the negotiations, which resulted in the making of that contract. Barker was the special attorney in that matter of Kinney. Just what the conversation was or what was said that might advise these parties that were there of the fact that I was appearing for Jenkins and taking care of his interest in the matter, I cannot now recollect. It would be a difficult thing to do anyway. That I was there and represented Jenkins as assignee, and to some extent also Mr. Kinney, because at that time I was employed by Mr. Kinney in his suits in connection with this matter, I have little doubt. The wording of the contract itself is, to my mind, confirmatory of the fact that the parties knew I was acting for Jenkins. The words, "and the said lien to be and the same is hereby made prior to all interests in question in the litigation aforesaid." * * * "He shall continue to collect the rent, and have the control of said premises as aforesaid until said litigation shall be finally disposed of for the benefit of the parties who may then be under the decision of the court entitled to said premises and rents, to which parties said Loewenthal hereby agrees to then account therefor, and said Rosenberg agrees to assign said lease or leases to such party," * * * "and neither said Kinney nor any other person shall have any relief except subject to the right of said Loewenthal, to be fully repaid as follows for advances."

That, in connection with the fact I had given notice to Mr. Pence about a month before that Jenkins did claim an interest in these premises, in reference to the

prosecution of the suits in the Appellate Court and Supreme Court.

On the 18th day of June, 1878, a writ of error was sued out from the Appellate Court to the Circuit Court in the Bauer case. At the October term the transcripts were filed, and the case was continued for notice at the March term of 1879. My recollection is the case was continued by arrangement at the October term, 1879. It was continued for notice, and on the 16th day of December, 1879, during that term, Jenkins was made a party plaintiff. At the March term, 1880, the case was again continued by arrangement, and at the October term it was submitted to the court. During the October term the decree was reversed, and on April 7, 1881, a rehearing was allowed, and the cause was again argued. May 16, 1881, it was argued, and on the 14th June it was reversed, and the cause remanded.

In the case of the International Bank vs. Walker, a writ of error was sued out at same time, June 18, 1878. At the October term, 1878, the case was heard, and the decree affirmed; was taken to the Supreme Court, and finally decided Feb'y 2, 1881. The two cases ran along together, one waiting on the other to some extent.

Cross-examination: I will not say that while the Kinney, Loewenthal & Rosenberg contract was being transacted I recollect definitely of telling Loewenthal that I represented Jenkins, but rather that it would be impossible to recollect, but Mr. Loewenthal or Mr. Ahrens must have understood it. I did not see Rosenberg; he was a figure-head. To have made Jenkins a party to that contract would have involved the obtaining an order from the United States District Court and an application to the court for that purpose. The only reason I know why he was not made a party was to

avoid trouble. I had scarcely any conversation with Loewenthal.

Q. As a lawyer, Mr. Burgess, you know that in order to bind Mr. Jenkins it was necessary for Mr. Jenkins to be a party to that contract? A. No, sir; Mr. Jenkins stood by and assented to that contract, and was as much bound by it as though he was a party to it, for the reason that he allowed the mortgagee in possession to go on and make improvements. I do not think that Mr. Jenkins should (need) be made a party to it.

Admission: It is admitted that the assessment for taxes, for non-payment of which the land was sold and deed made to Jacob Rosenberg, dated March 22, 1876, was made by the city assessor, and not by the county assessor, in the year 1873.

Trust Deed—Walker to Rogers, dated December 29, 1871, by Walker and wife to John G. Rogers, trustee, recites the making of three $50,000 notes, to secure them conveys lots 21 to 36 in block 10, Walker's Dock Addition, with power of sale to pay notes and all moneys advanced for taxes or other liens and assessments, with the interest thereon.

Petition for appointment of Receiver by the International Bank, filed March 26, 1879.

STATE OF ILLINOIS, } ss. Circuit Court of
Cook County. } Cook County.

AUGUSTUS BAUER.
vs.
SAMUEL J. WALKER ET AL.

To the Honorable the Judges of the Circuit Court of Cook County in Chancery sitting.

Your petitioner, the International Bank of Chicago, respectfully represents unto your Honors:

That the following described premises were ordered sold by the decree of this Court on April 25th, 1878, viz:

First: Lots twenty-one (21) to thirty-six (36), both inclusive in Block ten (10) in S. J. Walker's Dock Addition to Chicago, being a Sub-division of the East half North of the river of Section thirty (30), Township thirty-nine (39), North of Range fourteen (14), East of the third Principal Meridian, situated in the city of Chicago, County of Cook, and State of Illinois.

Second: Lots eleven (11) to eighteen (18), both inclusive in Block twelve (12) in Samuel J. Walker's Dock Addition to Chicago.

Third: Commencing at a point in the East line of the West half of Section thirty (30), Township thirty-nine (39), North of Range fourteen (14), East of the Third Principal Meridian, in Cook County, Illinois, where said East line intersects the South shore of the West branch of the South branch of the Chicago river, thence running South along said East line to the North shore of the Illinois and Michigan Canal, thence Northeasterly along the North shore of said Canal eight hundred feet (800 ft.), thence North parallel with said East line of the West half of Section thirty (30) aforesaid to the South shore of said West branch of the South branch of the Chicago river aforesaid, thence Southwesterly along said South shore eight hundred feet (800 ft.), more or less, to the place of beginning, otherwise described as that part of the Southeast quarter of Section thirty (30) aforesaid, having a frontage of eight hundred feet (800 ft.) on the Illinois and Michigan Canal, and bounded North by the West branch of the South branch of the Chicago river, West by the West line of said Southeast quarter, South by the Illinois and

Michigan Canal, and East by a line running parallel with said last mentioned West line at a distance of eight hundred feet (800 ft.) East thereof.

That the amount found due by this Court and secured upon the premises, firstly and secondly above described, is the sum of about $226,000 upon collateral notes.

That said premises, firstly and secondly above described were sold under the said decree for the sum of $70,500 unto Jacob Rosenberg in trust for all the parties interested in said securities as found by said Court, and that there remains a deficit after said sale of about $155,000 upon said collateral notes, and a deficit upon the indebtedness, specifically secured thereby, of over $1,000. And that there is a deficit due your petitioner generally from said Walker of about $47,000, secured on said premises by said blanket agreement.

That the amount found due by the Court and secured upon the premises thirdly above described is the sum of about $150,000 on the collateral notes.

That the premises thirdly above described were sold under said decree for the sum of $65,000 unto Jacob Rosenberg in trust, for all the parties interested in said securities as found by said Court, and that there remains a deficit after said sale of about $85,000 on said collateral notes, and a deficit upon the indebtedness specifically secured thereby of over $18,000, and that there is a deficit due your petitioner generally from said Walker of about $42,000 secured by the blanket agreement upon said property.

That certificate of purchase was issued to the purchaser at such sale, bearing date June 24, 1878, and that the purchaser thereof will not be entitled to a deed therefor until September 25, 1879.

That no taxes have been paid upon said premises for four or five years, and that said Samuel J. Walker is insolvent and a bankrupt.

That said premises are going to waste, that persons are in possession of the same, and are removing the clay for the purpose of brick making, and said premises are being subjected to irreparable damages.

That said premises or a large proportion thereof can now be rented to advantage.

Therefore your petitioner prays that a proper person may be appointed to rent said premises under the discretion of this Court, and also to receive the rent or profits arising therefrom and to manage said estate for the benefit of the parties entitled thereto, and that all necessary directions may be given by the Court pertaining thereto.

And your petitioner will ever pray, etc.

BERTHOLD LOEWENTHAL,
President of the International Bank.

STATE OF ILLINOIS, } ss.
Cook County. }

Berthold Loewenthal, being duly sworn, deposes and says that he has heard read the foregoing petition, and that the same is true.

BERTHOLD LOEWENTHAL.

Subscribed and sworn to before me this ——— day of March, A. D. 1879.

Order of Circuit Court, made March 26, 1879, in the Bauer case.

AUGUSTUS BAUER
12962—143 vs. } Bill.
SAMUEL J. WALKER ET AL.

The motion for the appointment of a receiver in this

cause, having come on to be heard, on motion of Rosenthal & Pence, solicitors for the petitioner;

It is ordered by this Court that Berthold Loewenthal be and he hereby is appointed receiver for the purpose of managing and taking care of and protecting the following described premises, viz:

First. Lots twenty-one (21) to thirty-six (36) both inclusive, in block ten (10) in S. J. Walker's Dock Addition to Chicago, being a subdivision of the East half North of the river of Section thirty (30), Township thirty-nine (39), North of Range fourteen (14), East of the third principal meridian, situated in the City of Chicago, County of Cook, and State of Illinois.

Second. Commencing at a point in the East line of the West half of Section thirty (30), Township thirty-nine (39), North of Range fourteen (14), East of the third principal meridian, in Cook county, Illinois, where said East line intersects the South shore of the West branch of the South branch of the Chicago river; thence running South along said East line to the North shore of the Illinois and Michigan canal; thence Northeasterly along the North shore of said canal eight hundred feet (800 ft.); thence North parallel with said East line of the West half of Section thirty (30) aforesaid to the South shore of said West branch of the South branch of the Chicago river aforesaid; thence Southwesterly along said South shore eight hundred feet (800 ft.) more or less, to the place of beginning, otherwise described as that part of the Southeast quarter of Section thirty (30) aforesaid, having a frontage of eight hundred feet (800 ft.) on the Illinois and Michigan canal, and bounded North by the West branch of the South branch of the Chicago river, West by the West line of said Southeast

quarter, South by the Illinois and Michigan canal, and East by a line running parallel with said last mentioned West line at a distance of eight hundred feet (800 ft.) East thereof.

And also for the purpose of renting said premises and collecting the rents and dues arising out of said real estate, and he is hereby vested with all the rights and powers of a receiver in chancery, according to the practice of this Court. That before entering upon his duties said Berthold Loewenthal shall file with the Clerk of this Court a bond for the faithful performance of his duties as such receiver in the penal sum of $10,000.00, to be approved by this Court, which bond is now filed and approved by the Court.

All contracts entered into by said receiver and all leases made by him shall first be submitted to this Court for approval.

And said receiver shall be at liberty to apply to the Court from time to time for such further orders or directions as may be necessary.

(Endorsed.) Entered March 26, 1879, E. S. W. (R. 22, p. 456.)

W. T. Burgess—recalled by Mr. Pence.

Mr. Pence—Q. I would like to ask Mr. Burgess one question as a witness, one question which I forgot. I want to ask you Mr. Burgess, if Mr. Loewenthal was not appointed receiver of this and other property by mutual consent betwixt you and me? A. Yes, sir, that was the arrangement.

Q. And that appointment included other property than this? A. Yes, sir, you and I were not acting for ourselves, but for other people.

Q. In our representative capacities? A. Yes, sir.

The order shows the appointment of a receiver for two pieces of property only. I will simply say that in reference to that matter, the property, the two pieces of property for which this appointment was made, one was the Kinney property and the other was the property held by the Union National Bank of Chicago; so far as the Union National Bank was concerned I had no right whatever to act for the bank, and I did not purport to be acting for it. But so far as the Kinney property was concerned, I was acting then in two capacities.

Q. In what way were you acting in two capacities? I was acting as solicitor looking after Jenkins interest, and after Mr. Kinney.

Q. Mr. Jenkins was not then made a party to this suit, was he here below or above? A. Mr. Jenkins was not made a party to the suit in this court, because—

Q. Well never mind the reason, Mr. Burgess, he was not a party. A. He could not be a party; as I said before the notice to me that I received, as I understood, was a notice on me on behalf of Mr. Jenkins to appear before Judge Williams.

Q. Did'nt we agree together and go over to Judge Williams who was sitting over in the Criminal Court at that time? A. There was considerable talk at the time and the application I think came from Mr. Badger to go there. Q. At any rate we went over? A. We went over.

Q. And you and I were both anxious to have it done? A. We were both anxious to have it, we both thought it was the best under the circumstances and I have not changed my opinion since.

Admission: That Loewenthal, the International Bank of Chicago, Bauer & Schoelkopf, are interested in this

property, and in this purchase from Mr. Kinney. That the purchase from Kinney was for the benefit of the four, and that the deed was taken in the name of Loewenthal.

Cross-examination of Burgess resumed. As to notifying Ahrens during these negotiations about the contract, that I was acting for Jenkins, and that Jenkins had an interest in the premises, my memory is not accurate as to details. I cannot repeat, at this lapse of time, just all that occurred during the negotiations that I made for that contract, of what took place between Loewenthal and me, and what took place between Ahrens and me. It is impossible for me to give it now. I can only give you my conclusions from the surroundings. What I state is rather what I conclude than what I remember. I can only say that I went there representing Jenkins, having had previous conversations with Badger about going there for that purpose, to look after the Jenkins interest.

To the court: I can only say, as I transacted business of that kind, it would be unusual for one to ask, "who do you represent," and "what are you here for."

John P. Ahrens, in open court for defense:

I acted as the attorney for Loewenthal in the negotiations and getting up of the contract between Loewenthal, Kinney and Rosenberg, for docking the premises in question and leasing them. I saw Kinney and Barker. Have no positive recollection of seeing Badger or Burgess about that. I had no conversation with Burgess that I recollect.

I had no knowledge at that time that Jenkins had any interest in the premises in controversy while that contract was in course of negotiation and execution. Kin-

ney claimed to own the property. Nothing was said about Jenkins having any interest in the property.

I remember positively seeing Barker about the matter. He represented Kinney. I did not know him to represent anybody else.

Before going to Cincinnati I went to the Recorder's office and found the record of the deed to Kinney and the mortgage by him to Kyle and Dunham. I went to Cincinnati. Saw Kinney and his attorney Glidden. We had various interviews, and all the negotiation was upon the basis of Kinney being the owner of the property.

Nothing was said as to whether the property was held as security.

Judge's signature to the certificate.

Appeal Bond, filed June 29, 1882.

Placita, July term, 1882.

Orders to be entered *nunc pro tunc* of the dates named.

Order Mar. 31, 1882.

The motion of Jenkins that the cause of Bauer vs. Jenkins *et al*, No. 12962, on supplemental cross-bill filed June 27, 1881, and the case of Jenkins vs. Loewenthal et al, No. 38233 be heard at the same time, came on to be heard, was objected to by Rosenthal & Pence, solicitors for Bauer *et al*, and it appearing to the court that the said supplemental cross-bill filed by the said Jenkins assignee, &c., in 12962 embraces the whole subject matter in dispute more completely than the bill filed by said Jenkins, assignee, &c., in No. 38233, and the complainants in the cross-bill filed in this case refusing to dismiss it so as to allow the original bill to be dismissed with

costs, it is ordered that the Bauer case on the said supplemental cross-bill be heard with this case.

Order of Mar. 31, 1882.

Motion that the cross-bill be dismissed so that the complainant may move for leave to dismiss his original bill, which is objected to by defendants in original bill, and by reason of such objection is refused.

ASSIGNMENT OF ERRORS.

1. That the Court below admitted improper evidence and excluded proper evidence.

2. That it dismissed the bill of complaint, whereas it should have rendered a decree for complainant therein as prayed for.

3. That it refused to consolidate with and hear this case in the Bauer case.

W. T. BURGESS,
Att'y for Appellant.

OPINION OF SUPREME COURT OF ILLINOIS.

STATE OF ILLINOIS,
Supreme Court,
NORTHERN GRAND DIVISION.

At a Supreme Court begun and held at Ottawa, on Tuesday, the fifth day of September, in the year of our Lord one thousand eight hundred and eighty-two, within and for the Northern Grand Division of the State of Illinois.

Present: Hon. John M. Scott, Chief Justice; Pinkney H. Walker, Justice; T. Lyle Dickey, Justice; Benj. R. Sheldon, Justice; Jno. Scholfield, Justice; John H. Mulkey, Justice; Alfred M. Craig, Justice.

James McCartney, Attorney General. Everell F. Dutton, Clerk.

Be it remembered, that afterwards, to-wit: on the 20th day of Nov. A. D. 1882, the opinion of the Court was filed in the Clerk's office of said Court in words and figures following, to-wit:

ROBERT E. JENKINS,
Assignee, etc.,
No. 37650.
Appeal from Cook.
vs.
BERTHOLD LOEWENTHAL ET AL.

Opinion by CRAIG, J.

This was a bill in equity brought by Robert E. Jenkins, assignee in bankruptcy of Samuel J. Walker, in the Circuit Court of Cook County, on the 27th day of May, 1881, against Berthold Loewenthal and others, to set aside and declare null and void two certain deeds conveying the title to lots 21 to 36 inclusive, and the south half of lot 37, all in block 10, S. J. Walker's Dock

addition to Chicago. The first deed was executed Nov. 16th, 1880, by Eli Kinney and Martha S., his wife, to Louis Kuhn. Second was executed Nov. 16th, 1880, by Louis Kuhn to Berthold Loewenthal; each purport to convey the lots above described. The title to the property conveyed by Kinney and wife to Kuhn had been obtained from S. J. Walker by Kinney under two warrantee deeds, one dated Jan. 9th, 1873, recorded Jan. 21, '73, conveying absolutely lots 21 to 34 inclusive, and one dated Jan. 9th, 1874, recorded Feb. 19, '74, conveying lots 35 to 36 and south half of 37. It was alleged in the bill that the two deeds from Walker to Kinney although absolute in form were in fact made as security for an indebtedness from Walker to Kinney of about the sum of $110,000. It is also alleged that Loewenthal purchased with notice that the deeds were only intended as security. It is also alleged in the bill that the indebtedness due from Walker to Kinney was not transferred to Loewenthal. The bill does not ask to pay off the indebtedness from Walker to Kinney and redeem the premises from the mortgage, but prays that the title acquired by Loewenthal be declared to be either a nullity or to have been acquired and to be held in trust for complainant as such assignee, and that Loewenthal be required to convey to him as assignee. The answer of defendants denied that the deeds from Walker to Kinney were not absolute in fact; denied that defendants had notice that the deeds were made as security for money due from Walker to Kinney. The answer set up that Kinney from the time Walker conveyed to him down to the time he deeded the property denied the deeds to him conveyed the absolute title; that Kinney had been all the time in possession of the property,

claiming to own the same. The answer also alleges that Walker knew Kinney claimed to own the premises and admitted him to be the owner; that Jenkins from the time he was appointed assignee of Walker, on July 31, 1878, knew that Kinney claimed said premises adversely and that both he and Walker acquired in such adverse claim and pleaded the United States two years' statute of limitations in bar of the relief claimed in the bill. It appears from the record that on the 31st day of December, 1871, Sam'l J. Walker being the owner of the premises, executed and delivered a trust deed thereon to John G. Rogers, to secure the payment of three notes which he made at the same time for $50,000 each. These three notes and deed of trust were pledged to the International Bank to secure five notes given by Walker to the Bank, amounting in the aggregate to $54,498. These notes were owned by the Bank, Bauer, Schoellkopf and Loewenthal. After the making and recording of the trust deed to Rogers, Walker conveyed the premises to Kinney by the two warrantee deeds above named. On the 29th day of August, 1874, Bauer, who held one of the notes secured by the trust deed to Rogers, filed his bill in the Circuit Court of Cook County to foreclose the trust deed, making all parties in interest, including Walker and Kinney, parties thereto. In this bill it was alleged that Walker, after the execution of the trust deed, had conveyed the premises to Kinney by two warrantee deeds. In his answer to this part of the bill Walker says: This defendant further answering admits the execution by himself and wife of the deeds to said defendant, Eli Kinney, referred to in said bill, and claims and insists that said conveyances were for good and valuable considerations, and that the title to the

premises therein described passed thereto to said Kinney, and that the same ought in justice and equity to stand discharged of any and all liens thereon." Kinney was also a party defendant to the bill and service had upon him by publication of notice; he did not appear but was defaulted and a decree of sale rendered April 25th, 1878.

On the 24th day of June, 1878, the lots were sold and bid off by Rosenberg, who purchased for the Bank, Loewenthal and Schoellkopf. On the 27th day of Sept. 1879, no redemption having been made, the Master deeded the property to the purchaser under the decree. On the 26th day of April, 1878, Walker filed his petition in bankruptcy. On July 31, Jenkins was appointed assignee, and a deed of assignment made to him. On the 18th day of June, 1878, Walker sued out a writ of error from the Appellate Court to reverse the decree rendered in the Bauer case, and Jenkins was afterwards substituted in his place, with leave to prosecute the writ of error. While the writ of error was pending, Kinney, who had been brought in the foreclosure suit by publication, obtained from the court leave under the statute to come in and defend. Kinney filed an answer in which he set up that he had purchased the premises and was the owner in fee under the deeds from Walker, and that he was in possession. In November, 1880, Loewenthal met Kinney at Cincinnati and purchased his interest in the property for $20,000. Kinney at the same time executed a release of all errors in the suit then pending in the Appellate Court, and stipulated that a decree might be entered in the Circuit Court in the Bauer case, which was still pending, confirming the decree which had originally been entered on the 25th day

of April, 1878. Judgments were subsequently rendered in the Appellate and Circuit Court in conformity to the stipulation. If it be conceded that the two deeds made by Walker to Kinney were not intended by the parties to be absolute, but the conveyance was made merely to secure the payment of money due from Walker to Kinney; still, unless Loewenthal had notice before he purchased from Kinney that the deeds were but mortgages, his purchase cannot be defeated. The fact that the absolute title appeared to be in Kinney would justify any person in buying from him, and such a purchaser would be protected in his purchase, unless he had notice before buying that Kinney held merely as mortgagee. It is first insisted that the deposition of S. J. Walker, which was taken in the Bauer case, was notice to Bauer, Loewenthal, Schoellkopf and the Bank, that the conveyance to Kinney was a mortgage. It does not appear that the parties had any actual knowledge of what Walker had sworn to in his deposition, but conceding that they were chargeable with notice of the contents of the deposition taken, in a case wherein they were parties, we do not think that the deposition of Walker establishes the fact that the deeds made by him to Kinney were mortgages. The evidence relied upon was as follows:

Q. Was not said conveyance made to Kinney, free and clear from all incumbrances? A. The deed was so made, they agreeing to allow me a liberal price towards my indebtedness if I would make the property clear. There was some sort of a statement given at the time, or shortly after, that as soon as I made it clear, they were to give up certain paper. I further state, that I stated to them that this property, instead of being bound

for $150,000, that there was an indebtedness on it claimed by the bank of $55,000 in this and other property, and I would further state that the banks of Hoffman agreed, immediately after the panic or directly after sale, knowing of it of course, as the sale was published in the papers, to release this property on the payment of $30,000, which would have left me a credit with Kinney & Co., on account of my indebtedness, of some $100,000 or more.

"I further state that I conveyed this property to Mr. Kinney for the purpose of securing a settlement in case I could relieve it; they at the time of my conveyance not paying me any money consideration whatever, the object being to secure a settlement with them, if possible, on the most favorable terms possible."

This testimony falls far short of proving the deeds to be mortgages. It does not appear that there was any understanding or agreement that the property was to be at any time or upon any terms or conditions reconveyed to Walker, or that he had any right to redeem. On the other hand, it seems clear from the first part of his evidence that an absolute conveyance was made and Kinney & Co. were to be the owners of the property, and that they agreed to allow Walker a liberal price for the property when he should clear the property of the prior encumbrances. The fact that the amount Kinney was to give Walker for the property was not then fixed does not militate against this view. If, therefore, appellees knew of this evidence, the deposition contains nothing which should prevent them from becoming purchasers from Kinney. But it is said that in the proceedings in bankruptcy the lots in question were scheduled as a part of Walker's assets, and as

Loewenthal proved his debt in the bankrupt court, he is chargeable with notice of all that appears in the proceedings. There might be force in the argument if Loewenthal was claiming title under the bankrupt proceedings; but he does not claim under these proceedings, and the mere fact that he proved a claim against Walker's estate could not make him chargeable with notice of these proceedings. Loewenthal was as much a stranger to the schedule of assets belonging to Walker's estate as he would have been had he never proved any claim against the bankrupt. It is next contended that the notice served on Rosenthal and Pence by Mr. Burgess Jan. 14th, 1880, was notice to Loewenthal that Kinney's interest in the premises was but a mortgage. It is perhaps true that notice to an attorney will be notice to the client, but to make the notice obligatory the attorney must at the time be engaged as an attorney in reference to the matter embraced in the notice. In this case when the notice was served on Rosenthal & Pence, they were not attorneys to negotiate a purchase of the equity of redemption of Kinney; they had never been employed for that purpose, indeed, they had nothing to do with Kinney's equity of redemption, and a notice to them was not binding on Loewenthal. But the contract under which the premises were leased Feb. 15th, 1880, is relied upon. All the parties interested in the property met Rosenberg, who had the Master's deed; Loewenthal, who represented Bauer; the Bank and Schoellkopf and Kinney, who had purchased the equity of redemption from Walker; these parties came together and concluded that while the property was in litigation it would be better to have it docked and leased to some responsible parties, and

consequently an agreement was made which is set out in the record. It appears that during this meeting Badger, who represented Jenkins, and Burgess were present, and the argument is that the presence of Badger was enough to put Loewenthal on inquiry—Jenkins did not execute the lease, and so far as is disclosed by the evidence, Badger took no part in the negotiations, neither he or Burgess gave notice that Jenkins, assignee, claimed any interest in the property, and we do not think their presence was enough to put Loewenthal or any one else on inquiry. It is also claimed that a bill filed by Jenkins, as provisional assignee, in the United States Court proves notice to Loewenthal this bill was filed after a final decree was rendered in the Circuit Court in the Bauer case, which attempted to go over the same matters again. All the proceedings in the Bauer case were set out. The bill was dismissed, and in what manner the filing of such a bill could be regarded as notice to Loewenthal that Kinney held under two certain deeds merely as mortgagee we are unable to perceive. Indeed, we find no evidence in the record which is sufficient to bring home notice to Loewenthal that Kinney held as mortgagee; on the contrary, from the admissions, declarations and acts of Walker, Jenkins and Kinney in regard to the ownership of the property, would lead any reasonable man to believe that the deeds from Walker to Kinney passed the absolute title. Why did Walker set up in his answer that he had conveyed the absolute title to Kinney if such was not the fact? Why did Jenkins, the assignee of Walker, permit Kinney, without a word of dissent to claim, mortgage and contract for the improvement and leasing of the property for a term of years as the abso-